IN THE

Supreme Court of the United States

OCTOBER TERM 1997

CALIFORNIA DENTAL ASSOCIATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Trade Commission (the "Commission") issued an administrative complaint alleging that the California Dental Association ("CDA"), a non-profit professional association, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by prohibiting member dentists, through its Code of Ethics, from engaging in false or misleading advertising. Despite the finding by the Administrative Law Judge that CDA's enforcement of its Code of Ethics "has no negative impact on competition," the Commission and the Court of Appeals held that CDA violated the antitrust laws. The two basic questions presented by this petition are:

1. Whether the Commission has jurisdiction over nonprofit professional associations.

2. Whether a nonprofit professional association violates the antitrust laws under the rule of reason when its advertising disclosure requirements are animated by procompetitive purposes, do not directly affect price or output, and have no negative impact on competition.

RULE 29.1 LISTING

The California Dental Association has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, CDA, respectfully prays that a writ of certiorari issue to review the judgments of the Court of Appeals for the Ninth Circuit entered on October 22, 1997 and January 28, 1998.

OPINIONS BELOW

The opinion of the court of appeals is reported at 128 F.3d 720 and is reproduced in the Appendix at 8a. The order denying rehearing is reproduced in the Appendix at 266a. The opinion of the Commission and the initial decision of the Administrative Law Judge ("ALJ") are reproduced in the Appendix at 43a and 159a, respectively.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1997. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISIONS

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . .

Section 4 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 44, provides in pertinent part:

> The words defined in this section shall have the following meaning when found in this subchapter, to wit:
>
> * * * * *

> "Corporation" shall be deemed to include any company . . . or association, which is organized to carry on business for its own profit or that of its members . . . .

Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), provides in pertinent part:

> (1) Unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
>
> (2) The Commission is hereby empowered and directed to prevent persons, partnerships or corporations . . . from using unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce.

STATEMENT OF THE CASE

This case involves a nonprofit professional association charged with restraining trade by enforcing a provision of its code of ethics which bars false and misleading advertising. The case has been controversial from its outset, resulting in differing methods of analysis at each level of adjudication and split decisions by both the Commission and the Ninth Circuit. The Commission majority held that CDA's Code of Ethics violated Section 5 of the FTC Act, 15 U.S.C. § 45, despite the ALJ's finding that

> the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has *no impact on competition* in any market in the State of California, *particularly with respect to price and output*.

App. 246a (emphasis added). The panel majority of the Ninth Circuit affirmed the Commission's decision, raising two significant issues of antitrust law: *first,* does the Commission have jurisdiction over CDA as a nonprofit professional association; and *second,* can a prohibition against false

and misleading advertising which has been affirmatively found to have no impact on competition, nonetheless violate the antitrust laws under the rule of reason.

1. Factual Background

a. The California Dental Association

CDA is an association of dentists whose principal purposes are to promote high professional standards in the practice of dentistry, encourage the improvement of the health of the public, and advance the art and science of dentistry. CDA is not organized for profit, has no shares of stock or certificates of interest, and no portion of its net earnings inures to the benefit of any member or individual. The dues revenue received by CDA is not distributed to its officers, members or directors. Rather, CDA's funds are used to implement the objectives and goals of the association as specified by its Bylaws and Articles of Incorporation. App. 161a-62a; RX 117-D; TR 1140-42, 1769-70. CDA is exempt from federal income taxation under IRS Code Section 501(c)(6). App. 174a.

CDA promotes a vast array of educational, scientific, and public health objectives. For example, it develops material for use in community dental health projects such as school screenings, baby bottle tooth decay videos, dental health materials for school age children, and senior abuse/neglect detection. App. 165a; TR 1148-49. CDA provides information to the public regarding scientific aspects of dental treatment and procedures, and up-to-date data on public health issues such as AIDS, transmission of infectious diseases, infection control techniques and hazardous substances. App. 164a; TR 1154. CDA is also a leading force in continuing dental education. TR 1150, 1161-62.

CDA promotes public health even when doing so is contrary to the economic interests of its members. It led the fight for fluoridation in California, perhaps the most cost-

effective dental health initiative enacted, despite the fact that fluoridation reduces the need for dental care. App. 188a-89a; TR 814-15, 1300-01.

CDA also provides certain ancillary services to its members such as lobbying concerning dental issues, marketing, public relations and practice management seminars, assistance in compliance with OSHA and other laws and regulations, and administrative procedures for resolving patient complaints. App. 164a-65a, 181a-82a. In addition, CDA operates several ancillary for-profit subsidiaries through which members can obtain liability and other types of insurance, financing for equipment purchases and home mortgages, and auto leasing. App. 165a-70a.

While approximately 75% of the practicing dentists in California are members of CDA, membership is entirely voluntary and is not a prerequisite to licensure or the successful practice of dentistry. More than 5,500 dentists who actively practice dentistry in California do not belong to CDA. App. 144a, 161a-62a, 245a; TR 733-34, 833, 1639.

b. CDA's Ethical Standards

To promote public confidence in the practice of dentistry, CDA has promulgated a Code of Ethics. The Commission's complaint focuses on the provisions of the Code that prohibit false and misleading advertising. These provisions substantially mirror California state law. App. 190a-91a; RX-64-A; RX 136 A-E; TR 1085-87. Section 10 of the Code sets forth CDA's basic ethical standard:

> Although any dentist may advertise, no dentist shall advertise or solicit patients . . . in a manner that is false or misleading in any material respect.

App. 190a. CDA relies on the California Dental Practice Act to define what is false and misleading. App. 218a.

The Commission's complaint centers on the application of Section 10 to discount and quality advertising. The Code of Ethics does not prohibit either type of advertising. Rather, the Code requires such ads to disclose specified facts to insure that consumers are not misled. Advertisements regarding a discounted fee are required to disclose the amount of the non-discounted fee, the amount or percentage of the discount, the length of time the discount will be available, and an identification of those who qualify for the discount. App. 200a. With respect to advertisements regarding quality, the Code requires member dentists to refrain from using subjective and ambiguous phrases that are not susceptible to measurement or verification and are therefore more likely to deceive or mislead the public. App. 202a-04a, 216a-18a.

The maximum sanction that CDA can impose on a member who violates the Code of Ethics is exclusion from CDA. CDA has no power or ability to impede a member's practice of dentistry. CDA has no control over whether a dentist chooses to join CDA, and CDA cannot impose its ethical principles on dentists who have no connection with CDA. App. 144a; TR 1170-71, 1352-54, 1640-41.

2. Proceedings Below

a. The Administrative Hearing

The Commission asserted jurisdiction over CDA under Section 4 of the FTC Act, claiming that CDA is "organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. On the substantive antitrust issues, the Commission presented *no evidence*, even in the form of expert testimony, regarding the competitive effect of CDA's challenged practices. App. 110a.

The ALJ found that the Commission had jurisdiction over CDA because a "substantial" portion of CDA's activities "engender a pecuniary benefit to its members." App.

253a. On the competitive effect of CDA's Code of Ethics, the ALJ made several critical findings, including:

1. "complaint counsel have not produced any convincing evidence that CDA members have acted or could act together to raise prices or reduce output, nor have they established in what geographic market or markets the alleged market power could be exercised." App. 262a.

2. "the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has no impact on competition in any market in the State of California, particularly with respect to price and output." App. 246a.

3. "CDA's enforcement of its Code of Ethics with respect to advertising has no negative impact on competition in any dental market in California because it cannot erect any barriers to entry . . . into any dental market in California." App. 245a.

4. "The oversupply of dentists . . . [is] strong evidence of low entry barriers." *Id.*

5. "CDA membership is not a prerequisite to successful practice in any California Dental Market." *Id.*

6. "CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local." App. 262a.

7. "CDA has a legitimate interest in fostering truthful, informative advertising by its members . . . ." App. 258a.

8. "Professor Knox [the only economist to testify] testified that scrutiny of dental advertising is pro-competitive because advertising which is false and misleading has a negative impact on competition." App. 245a-46a.

In light of these findings, the ALJ held that the Commission failed to establish a Section 5 violation under traditional rule of reason analysis. App. 262a. Nevertheless, the ALJ found that this failure was "not fatal." *Id.* Instead, he applied the Commission's analytical approach announced in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988) ("*Mass. Board*"), and concluded that CDA's Code of Ethics is "inherently suspect" and can be "quickly condemned" as an unreasonable restraint of trade without a detailed market analysis. App. 257a, 259a, 262a. The ALJ faulted enforcement of the Code as overbroad because it barred "inexact" and incomplete advertisements. App. 260a.

b. The Commission Decisions

The Commission, by a vote of 4 to 1, affirmed the ALJ's finding of a violation, but disagreed with the ALJ's analytical approach. App. 45a. On the jurisdictional issue, the Commission ruled that CDA comes within Section 4 of the FTC Act because "CDA confers pecuniary benefits upon its members as a substantial part of its activities." App. 51a. With respect to the competitive effect of CDA's Code of Ethics, the Commission majority declared that it would not follow its own *Mass. Board* decision. Instead, the majority determined that CDA's disclosure requirements for discount advertising constituted a *per se* violation of the antitrust laws, even though the Code concededly "differ[s] from the classic price fixing conspiracy." App. 63a. Alternatively, the Commission majority applied the "quick look" rule of reason approach to the Code's treatment of discount advertising and to claims of superiority. By its own admission, the majority's application of the rule of reason was "simple and short," involving no substantial analysis of market definition, market power or competitive effects or any attempt to quan-

tify any increase in price or reduction in output. *Id.* at 74a, 78a.

The majority's reliance on the *per se* rule and its cursory rule of reason analysis brought a thorough and strongly worded dissent from Commissioner Azcuenaga.[1] She described the majority's approach as "chimerical" and unable to "withstand the hard light of day." *Id.* at 108a. The focus of Commissioner Azcuenaga's dissent was the "weakness of the majority's anticompetitive effects story." *Id.* at 146a. She noted that at trial, the Commission "did not offer evidence, even in the form of testimony of an expert economist, on fundamental elements of a rule of reason analysis." *Id.* at 110a. She found "startling" the majority's "failure to identify a geographic market before finding liability" and its "treatment of the entry issue." *Id.* at 147a. Commissioner Azcuenaga concluded: "No anticompetitive effects having been shown, the complaint should be dismissed . . . ." *Id.* at 110a.

c. The Court of Appeals Decisions

The Court of Appeals for the Ninth Circuit had jurisdiction over CDA's Petition for Review pursuant to 15 U.S.C. § 45(c). By a 2 to 1 vote, the Court of Appeals affirmed the Commission's finding of a violation, but disagreed in part with the Commission's approach. On the jurisdictional issue, the Ninth Circuit acknowledged a split among the circuits. The majority disagreed with the Eighth Circuit, and sided with the Second Circuit, in holding that the FTC Act confers jurisdiction over nonprofit organizations that "provide tangible, pecuniary benefits to" their members. App. at 16a. On whether CDA's Code of Ethics violated the antitrust laws, the majority rejected the Commission's application of the *per se* rule to CDA's disclosure requirements

[1] Commissioner Starek also dissented from the majority's *per se* analysis. App 148a.

for discount advertising, but affirmed the Commission's "quick look" rule of reason approach. *Id.* at 17a.

Judge Real dissented from both the majority's holding on jurisdiction and its application of the "quick look" rule of reason. Judge Real stated that CDA, as a nonprofit professional association, does not operate commercially and "ha[s] no place in the commercial world of the F.T.C." *Id.* at 25a. He also noted that CDA's advertising restrictions are not "sufficiently anticompetitive on their face to eschew a full-blown rule of reason inquiry." *Id.* Judge Real criticized the majority for finding "a restraint on competition without the supporting help from any of the economic principles to be applied to a full market power analysis." *Id.* at 26a.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE COMMISSION HAS JURISDICTION OVER NONPROFIT, PROFESSIONAL ASSOCIATIONS IS AN IMPORTANT QUESTION ON WHICH THERE IS A CONFLICT AMONG THE FEDERAL COURTS OF APPEALS

As the Ninth Circuit acknowledged below, there is an irreconcilable conflict among the courts of appeals as to whether the Commission has jurisdiction over *bona fide* nonprofit professional associations such as CDA. App. 15a. This Court previously granted certiorari to settle this conflict but divided equally and produced no opinion. *American Medical Association v. Federal Trade Commission*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) ("*AMA*"). Thus, this jurisdictional issue has never been resolved by this Court since the passage of the Act in 1914.

A. The Ninth Circuit Expressly Acknowledged A Conflict

The Ninth Circuit applied the test enunciated in the Second Circuit's decision in *AMA*, which admittedly placed it in

direct conflict with the Eighth Circuit's decision in *Community Blood Bank of Kansas City Area, Inc. v. Federal Trade Commission*, 405 F.2d 1011 (8th Cir. 1969). App. 15a-16a. Unlike the Sherman Act, the FTC Act does not apply to all entities. Instead, Section 5(a)(2) of the FTC Act expressly limits the Commission's jurisdiction to "persons, partnerships, or corporations." 15 U.S.C. § 45(a)(2). Section 4 defines "corporations" to include only "any company . . . which is organized to carry on business for its own profit or that of its members . . . . *Id.* at § 44. In *AMA*, the Second Circuit held that Section 4 includes nonprofit associations; in *Community Blood Bank*, the Eighth Circuit held that Section 4 does not.

Since *AMA*, the Commission has made regulation of nonprofit associations a top priority.[2] The Commission's continuing campaign to litigate the self-regulatory efforts of professional societies imposes enormous burdens on these societies, including the diversion of scarce resources from their nonprofit and socially desirable objectives. The Court should once again grant certiorari in order to resolve finally

[2] The following represent consent decrees entered by the Commission against professional associations since 1990. Frequently, these associations do not have the financial resources to endure the time and expense of litigation and thus enter into consent decrees rather than contesting jurisdiction. *See, e.g., La Association Medica de Puerto Rico*, 60 Fed. Reg. 35,907 (July 12, 1995); *American Association of Language Specialists*, 59 Fed. Reg. 48,882 (September 23, 1994); *American Society of Interpreters*, 59 Fed. Reg. 48,882 (September 23, 1994); *McClean County Chiropractic Association*, 59 Fed. Reg. 22,163 (April 29, 1994); *National Society of Professional Engineers*, 58 Fed. Reg. 44,841 (August 25, 1993); *National Association of Social Workers*, 58 Fed. Reg. 17,411 (April 2, 1993); *Association of Engineering Firms Practicing in the Geosciences*, 58 Fed. Reg. 37,483 (April 2, 1993); *United States Golf Association*, 58 Fed. Reg. 5,991 (January 25, 1993); *American Psychological Association*, 57 Fed. Reg. 46,028 (Oct. 6, 1992); *Connecticut Chiropractic Association*, 56 Fed. Reg. 65,093 (December 13, 1991); *Capital Area Pharmaceutical Society*, 114 F.T.C. 159 (1991); *Empire State Pharmaceutical Society, Inc.*, 114 F.T.C. 152 (1991).

the conflict among the circuits regarding the Commission's jurisdiction over nonprofit professional associations.

In deciding what constitutes a corporation organized "for its own profit or that of its members," the *Community Blood Bank* court relied upon several familiar rules of statutory construction: that the Commission has only such jurisdiction as Congress conferred upon it by statute; that when the Commission's jurisdiction is challenged, it has the burden of establishing its jurisdiction; that legislative intent should be ascertained from the language of the statute itself when it is clear and plain; that the plain, obvious, rational meaning of the statute is to be preferred to any curious, narrow, hidden sense; and that common words are to be taken in their ordinary significance in the absence of any evidence of a contrary intent. 405 F.2d at 1015. Where, as here, the language of a statute is clear and unambiguous, review of the statute's legislative history is unnecessary. *See, e.g., Dunn v. Commodity Futures Trading Commission*, __ U.S. __, 117 S.Ct. 913, 921 (1997) (Scalia, J., concurring).

In *Community Blood Bank*, the Commission asserted jurisdiction over Community Blood Bank ("CBB"), the Kansas City Hospital Association and individual pathologists. CBB was organized as a nonprofit. The Association was a nonprofit which included as members Blue Cross Service Corporation, a 501(c)(4) corporation, two for-profit corporations, and a number of 501(c)(3) corporations. *Community Blood Bank of the Kansas City Area, Inc.*, 70 F.T.C. 728, 755-57 (1966). After a full trial the Hearing Examiner found that the Commission had jurisdiction over the respondents and that respondents had collectively restrained trade by impeding the development of two commercial blood banks. The Commission affirmed this decision. *Id.* at 728.

The Commission's determination of jurisdiction rested on the finding that both the CBB and the Hospital Association conferred pecuniary benefits upon their members in that

"both organizations performed very valuable services" that were "in the broadest sense exceedingly profitable for the doctors and for the hospitals to receive." *Id.* at 767. In addition, the Commission found that the hospital association "is also engaged in business for the benefit or profit of its members when it supplies to them information and other services which they might otherwise have to gather and render themselves." *Id.* at 909-10.

The Eighth Circuit reversed the Commission's decision and held that the CCB and the Association were outside the scope of the Commission's jurisdiction. Although the Association may have provided "valuable services" to its members, the Eighth Circuit recognized that, in light of the language and the legislative history of the FTC Act, the Commission's jurisdiction is limited to entities that are "organized" to conduct "business" for pecuniary "profit" of their members, as those words are commonly understood. *Community Blood Bank*, 405 F.2d at 1017-18, 1020. To help define the word "profit," the court quoted the following language from the Supreme Court of Wisconsin:

> [w]hether dividends or other pecuniary benefits are contemplated to be paid to its members is generally the test to be applied to determine whether a given corporation is organized for profit.

Id. at 1017 (quoting *Associated Hospital Service, Inc. v. City of Milwaukee*, 109 N.W.2d 271 (Wis. 1961)).

It is clear from *Community Blood Bank* that Congress gave the Commission jurisdiction over corporations "organized" for profit; it did not confer jurisdiction over every corporation that provides "pecuniary" benefits to its members.[3]

[3] Under the standard articulated in *Community Blood Bank*, the Commission is not bound by the mere form of incorporation. The Commission is free to determine whether an entity operates "in law and in fact" as a *bona fide* nonprofit corporation. *See Ohio Christian College*, 80 F.T.C. 815 (1972) (asserting jurisdiction over ostensible nonprofit based on finding it was a mere "shell" for an individual entrepreneur "to further his own finance and comfort"). However, where, as here, an association is organized and operated as a genuine nonprofit entity, the Commission's inquiry is at an end and the association is beyond the Commission's jurisdiction.

Here, rather than apply the *Community Blood Bank* standard, the Ninth Circuit followed *AMA* to find that the Commission had jurisdiction because, although organized and operated as a *bona fide* professional association, CDA's activities purportedly "provide tangible, pecuniary benefits to its members." App 16a.[4] However, this test, applied by the Second Circuit in *AMA* and adopted by the Ninth Circuit, departs from the clear language and meaning of the FTC Act and would extend the scope of the Commission's jurisdiction to cover virtually every nonprofit organization or professional association.

B. The Legislative History Supports CDA's Position

The language of the FTC Act is clear that the Commission does not have jurisdiction over nonprofit professional associations. Thus, there is no need to resort to the legislative history. Nevertheless, the legislative history supports CDA's position that nonprofit professional associations are not subject to the reach of the FTC Act. *See* H.R. Rep. No. 553, 63d Cong., 2d Sess. (1914); S. Rep. No. 597, 63d Cong., 2d Sess. (1914); H.R. Rep. No. 1142, 63d Cong., 2d Sess. (1914). Both the original Senate and House of Representatives versions of the bill to create the Commission were designed specifically to give the Commission jurisdiction

[4] The Ninth Circuit also cited *FTC v. National Comm'n on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1985). App. 15a. However, in that case, the court upheld the Commission's jurisdiction based on the express finding that the Commission on Egg Nutrition "was organized for the profit of the egg industry." *Egg Nutrition*, 517 F.2d at 488. Here, there is no similar finding in the record.

over purely commercial corporations. *See* H.R. Rep. No. 1142, 63d Cong., 2d Sess. 11 (1914); H.R. Rep. No. 1142, 63d Cong., 2d Sess. 14 (1914).

Moreover, the same Congress that limited the FTC's jurisdiction to for-profit corporations expressly made the Clayton Act, like the Sherman Act before it, applicable to all corporations and associations irrespective of whether they were for-profit or not-for-profit.[5] A comparison of these statutes clearly demonstrates that the FTC Act is not a "carefully studied attempt" to bring within it every entity "whose activities might restrain or monopolize commercial intercourse." *See U.S. v. Southeastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944).

C. In 1977 Congress Expressly Refused To Expand The Jurisdiction Of The FTC Act

Significantly, Congress rejected the Commission's 1977 request that it amend Section 4 of the FTC Act to extend its jurisdiction to nonprofit organizations, including professional associations. *See Proposed Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. (1977) (hereinafter *1977 Hearings*). As Commission Chairman Collier conceded:

> The bill [H.R. 3816] would make several changes in the jurisdiction of the Commission. In particular, it would: (1) Broaden the reach of the FTC Act by redefining 'corporation' to include nonprofit corporations . . . . We strongly support each of these changes.

1977 Hearings at 69.

[5] The Clayton Act, like the Sherman Act, applies to all "persons." *See* 15 U.S.C. §§ 7, 12.

Chairman Collier argued that the proposed statutory change was necessary in light of the Eighth Circuit's decision in *Community Blood Bank*:

> After *Community Blood Bank*, the Commission's efforts to reach nonprofit corporations engaged in deceptive or anticompetitive practices have succeeded only after the often time-consuming proof that the respondent, whatever its nominal form, was in reality a conduit for essentially commercial interests.

Id. at 82. Chairman Collier testified that the Commission encountered such problems when it challenged activities "of nonprofit corporations of a less traditionally commercial character." *Id.* Congress was not persuaded to extend the scope of the FTC Act. The Committee on Interstate and Foreign Commerce of the House of Representatives rejected the proposed provision to broaden the Commission's jurisdiction after hearing testimony noting the absence of jurisdiction under the current wording of Section 4. H.R. Rep. No. 339, 95th Cong., 1st Sess. 120 (1977). Thus, by exercising jurisdiction over nonprofit professional associations, the Commission claims authority that Congress refused to extend when it enacted the FTC Act and when it denied the Commission's proposed amendments in 1977.

D. The Court Should Resolve The Acknowledged Conflict

In the decision below, Judge Real succinctly observed "[t]hese non-profit membership organizations have no place in the commercial world of the F.T.C." App.25a. The position taken by CDA herein is not an argument for an exemption from the antitrust laws. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). The important issue here is: did Congress expressly confer jurisdiction on the Commission over nonprofit professional associations?

There are now four opinions from the federal courts of appeals on the Commission's jurisdiction and there is a direct conflict. The Supreme Court failed to resolve this conflict when it granted certiorari in the *AMA* case. It should grant this Petition now in order to clarify the Commission's jurisdiction.

II. THE NINTH CIRCUIT'S RULE OF REASON STANDARD IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND AT LEAST TWO OTHER COURTS OF APPEALS

The Ninth Circuit invalidated an ethical code which is facially procompetitive, supported by sound procompetitive justifications, and has been found to have no anticompetitive effects. This perverse result flows from the court's reliance on an abbreviated rule of reason that is in direct and irreconcilable conflict with the decisions of this Court, and the Courts of Appeals for the Third and Seventh Circuits. *See National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) ("*NCAA*"); *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722 (7th Cir. 1986); *Vogel v. American Soc. of Appraisers*, 744 F.2d 598 (7th Cir. 1984). The majority's decision in this case even conflicts with the decision of another panel of the Ninth Circuit. *American Ad Management Inc. v. GTE Corp.*, 92 F.3d 781 (9th Cir. 1996).

The conflict caused by *CDA* goes to the very heart of antitrust enforcement, as it creates confusion regarding the proper rule of reason standard under which the vast majority of conduct is evaluated. Unless this conflict is resolved by the Court, businesses in all industries will be unable to predict what conduct is consistent with antitrust requirements. Some businesses will refrain from procompetitive activity out of fear of antitrust sanctions, including treble damages, and the substantial litigation costs necessary to defend such

claims. Other businesses and associations may be judged to have acted unlawfully even where, as here, the conduct has no anticompetitive effect. In either case, efficiency enhancing practices are deterred and consumer welfare is harmed.

A. The Full-Scale Rule Of Reason Is The Prevailing Standard

Section 1 of the Sherman Act, and Section 5 of the FTC Act, prohibit only conduct that unreasonably restrains competition. *State Oil Co. v. Khan*, __ U.S. __, 118 S. Ct. 275, 279 (1997). The "test of legality" is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918). The "rule of reason" is the prevailing standard for evaluating a restraint's impact on competition. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

Under the rule of reason, the party challenging a practice has the burden of showing that the conduct has an anticompetitive effect in a relevant product and geographic market. *Brown*, 5 F.3d at 668. Such an effect can be shown directly, through proof of an increase in price or a reduction in output. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986). If direct evidence is unavailable, competitive injury can be inferred from a showing of market power in a properly defined market, including barriers to entry. *Id.* Market power is the ability to raise price above the level that would prevail in a competitive market. *NCAA*, 468 U.S. at 109 n. 38.

If the party challenging the conduct shows anticompetitive effect, the defendant must show that the conduct promotes a procompetitive goal. The finder of fact balances the anticompetitive effects proved by the plaintiff against the procompetitive benefits shown by the defendant. *American*

Ad, 92 F.3d at 791. The rule of reason is violated only if a practice's anticompetitive effects outweigh its procompetitive benefits. *Vogel*, 744 F.2d at 604.

Carefully limited and well identified practices have been determined by this Court to be so pernicious and lacking in procompetitive benefits, that a rule of reason analysis is unnecessary to assess their competitive effect. Such conduct, principally horizontal price fixing, is deemed to be *per se* illegal. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 178 (1965) ("[T]he area of per se illegality is carefully limited."); *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958). Because the *per se* rule precludes analysis of competitive impact, it is applied only after "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Khan*, 118 S. Ct. at 279.

In *NCAA*, the Supreme Court used for the first time an abbreviated rule of reason. *NCAA*, 468 U.S. at 109 n.39. As this Court suggested, the "quick look" approach may be used only to condemn practices that are "naked" restraints on price or output for which there are no procompetitive justifications. *Id.* at 109. In the vast majority of cases, a traditional "full-blown" rule of reason analysis is required. *See, e.g., Brown*, 5 F.3d at 678; *American Ad*, 92 F.3d at 789 ("this so-called 'quick look' analysis is the exception, rather than the rule").

Ultimately, whatever test is applied, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA*, 468 U.S. at 103. As is demonstrated by this case, full rule of reason analysis is necessary in most instances to ensure that procompetitive or competitively neutral conduct is not mistakenly condemned. *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 95 F.3d 593, 602 (7th Cir. 1996) (Cudahy, J., concurring). Erroneous, over-inclusive application of the antitrust laws results in over-deterence, which is itself anticompetitive. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235-36 (1st Cir. 1983) (Breyer, J.).

B. The Ninth Circuit's Use Of The Abbreviated Rule Of Reason Conflicts With The Rulings Of This Court, The Seventh Circuit, And Another Panel Of The Ninth Circuit

In its 2-1 decision below, the panel majority properly ruled that the *per se* rule is inapplicable to CDA's Code of Ethics. App. 18a. In so holding, the majority noted that CDA's ethical policies "do not, on their face, ban truthful, nondeceptive ads" and "the economic impact of the restraint is not immediately obvious." App. 17a-18a. Nonetheless, the majority applied an abbreviated rule of reason to CDA's disclosure requirements. App. 18a-19a. Because the practices in issue are not facially anticompetitive, the Court's use of the "quick look" is squarely at odds with this Court's decision in *NCAA*, and decisions by the Seventh Circuit and another panel of the Ninth Circuit.

At issue in *NCAA* were association rules that limited the number of televised football games and set the price for television rights. As the rules, on their face, fixed prices and reduced output, the Court concluded that the "anticompetitive consequences of this arrangement are apparent." *Id.* at 104. The trial court in *NCAA* found actual increased prices and reduced output caused by the challenged rules. *Id.* at 113. Thus, this Court condemned the practices under an abbreviated rule of reason without "a detailed market analysis." *Id.* at 109. In contrast, the ALJ in *CDA* explicitly found that the challenged advertising policies had *no effect* on price or output. App. 262a.

Construing *NCAA*, courts of appeals have held that an abbreviated rule of reason is appropriate only where a restraint is, on its face, anticompetitive. *Brown*, 5 F.3d at 669.

Absent such a restraint, a court must analyze the conduct's competitive effects under the traditional rule of reason approach. "Unless the practice 'almost always' makes consumers worse off, it is not subject to condemnation without more detailed study of its effects -- including proof of market power and actual injury." *Illinois Corporate Travel*, 806 F.2d at 727.

Illinois Corporate Travel involved a prohibition against discount advertising. 806 F.2d at 724. The Seventh Circuit refused to apply the "quick look" analysis even while acknowledging that the rule is "functionally" a price restriction. The court concluded that the rule is not a naked restraint because it "does not 'always or almost always' work to consumers' detriment." *Id.* at 724, 728. The prohibition had the possible effect of curtailing free-riding. *Id.* at 728-29. Since "some potential benefits" of the practice were proffered, "summary denunciation" of the rule as facially anticompetitive was inappropriate. *Id.*

Similarly, the Ninth Circuit refused to apply an abbreviated rule of reason in *American Ad*, 92 F.3d 781. That case involved a change in a seller's commission policy to eliminate agent discounting. The Ninth Circuit affirmed summary judgment in favor of the seller, rejecting application of the abbreviated rule of reason:

> [T]his so-called quick look analysis is the exception, rather than the rule. Proving injury to competition in a rule of reason case almost uniformly requires a claimant to prove the relevant market and to show the effects of competition within that market. . . . [T]he present case does not present the type of naked restraint on price or output that would justify a quick look.

Id. at 789-90 (internal quotations and citation omitted). The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice recently expressed the Division's view that the "quick look" be applied only to the "narrow" range of facially anticompetitive practices that "directly limit competition on price or output." Joel I. Klein, *A Stepwise Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST, Spring 1998, at 41, 42 ("*Klein*").

The Ninth Circuit's "quick look" condemnation of CDA's policies is directly at odds with *NCAA*, *Illinois Corporate Travel*, *American Ad*, and the views of the Antitrust Division. The *CDA* panel majority applied an abbreviated rule of reason to practices that it concedes "do not, on their face, ban truthful, nondeceptive [advertising]." App. 18a. Further, the majority acknowledged that CDA's justification for its policies -- preventing false and misleading advertising -- is a "legitimate, indeed pro-competitive, goal;" and it conceded "that as a general matter disclosure can augment competition and increase market efficiency by providing consumers more information." App. 19a. The ALJ confirmed CDA's "legitimate interest in fostering truthful, informative advertising" and that "scrutiny of dental advertising is procompetitive." App. 245a-46a, 258a.

Given these findings by the Ninth Circuit and the ALJ, it is impossible to view CDA's policies as naked restraints. As Judge Real's dissent emphasized:

> What the CDA was attempting to accomplish by its rules concerning advertising did not amount to a restraint on price competition. . . . What the CDA was monitoring was that dentists who wish[] to advertise discounts would have to fully disclose to the public the nature of the discounts. *Full disclosure is neither price fixing nor is it a ban on non-deceptive advertising.*

App. 25a-26a (emphasis added).

It is even more plain that CDA's policies regarding *non-price* quality advertising do not constitute a "naked" restraint

that might warrant a "quick-look" analysis. The Commission itself admitted that CDA's activities concerning "nonprice advertising are entitled to an examination under the rule of reason" because "we cannot say with equal confidence that . . .'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" App. 73a.

By using an abbreviated rule of reason to condemn CDA policies which, on their face, are not naked restraints, the panel majority has strayed far afield from the limited use of the quick look approved in *NCAA* and supported by the Antitrust Division. Further, the court's ruling is flatly inconsistent with the decisions in *Illinois Corporate Travel* and *American Ad*, which rejected the quick look even as to conduct with greater anticompetitive potential than that at issue here. The defendant in *Illinois Corporate Travel prohibited* discount advertising altogether, which the court acknowledged was "functionally" a price restriction. 806 F.2d at 724. Similarly, the defendant in *American Ad* completely *eliminated* commissions paid to sales agents. 92 F.3d at 783. In contrast, CDA's policies do not tamper directly with price or output, requiring only certain disclosures to reduce the risk that consumers will be misled.

An irreconcilable conflict exists between the Ninth Circuit's decision in *CDA* and *NCAA*, *Illinois Corporate Travel* and *American Ad*. That conflict threatens to broaden application of the "quick look" rule of reason to condemn conduct that, as here, has no anticompetitive effect. The Court should grant certiorari to resolve this conflict.

C. Use Of The Abbreviated Rule Of Reason In The Face Of CDA's Proffered Procompetitive Justification Conflicts With The Decisions Of The Third And Seventh Circuits

The manner in which the Ninth Circuit applied the abbreviated rule of reason also is in fundamental conflict with the decisions of other courts of appeals. The Ninth Circuit condemned CDA's advertising policies despite a procompetitive justification and a finding by the ALJ that the policies had no anticompetitive effect. This ruling is at odds with the Third Circuit's decision in *Brown*, 5 F.3d 658, and the Seventh Circuit's decision in *Vogel*, 744 F.2d 598.

Brown involved an agreement among Ivy League colleges to award financial aid only on the basis of need and to collectively determine the amount of financial aid for commonly admitted students. While the agreement was a naked restraint, the colleges met their burden under *NCAA*'s "quick look" to come forward with "'some competitive justification.'" *Id.* at 669. The need-based aid policies potentially widened the scope of students who could afford an Ivy League education. *Id.* at 669; 676-677. Given this explanation, the Third Circuit concluded that the arrangement potentially "enhances consumer choice" and that, rather than suppress competition, the agreements "may in fact merely regulate competition in order to enhance it." *Id.* at 677. The court held that the agreement must be judged under a "full-scale rule of reason analysis." *Id.* at 678.

In *Vogel*, the Seventh Circuit refused to invalidate an association's ethical bylaw under the "quick look" rule of reason, even though the bylaw "'tamper[ed]' with a 'price structure.'" 744 F.2d at 601. The court declined to condemn the bylaw unless "it has clear anticompetitive consequences and lacks any redeeming competitive virtues." *Id.* at 603. The court determined that the bylaw had a sound procompetitive rationale -- it barred a fee structure which incents

overstated valuations. *Id.* Accordingly, the plaintiff was required to demonstrate at trial that the bylaw was unreasonable under a full-blown rule of reason -- *i.e.*, to establish a relevant market, a substantial market share by the association's members, and an anticompetitive effect which exceeded any procompetitive benefits. *Id.* at 604.

The Ninth Circuit's *CDA* ruling cannot be reconciled with *Vogel* and *Brown*. Both decisions required a traditional rule of reason analysis of facially anticompetitive conduct once the defendant proffered a plausible procompetitive justification. The Antitrust Division recently expressed the same view. *Klein*, ANTITRUST, Spring 1998, at 42-43. CDA's advertising bylaws have the procompetitive purpose of augmenting consumer information to prevent deceptive advertising. Thus, the Ninth Circuit was required to abandon the "quick look" and apply a full-scale rule of reason analysis.

The importance of a full-scale rule of reason analysis where a plausible procompetitive rationale is tendered is demonstrated by this case. After a full trial, the ALJ found:

> the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has *no impact on competition* in any market in the State of California, *particularly with respect to price and output*.

App. 246a (emphasis added). The ALJ also found that "complaint counsel have not produced *any* convincing evidence that CDA members have acted or could act together to raise prices or reduce output." *Id.* at 262a (emphasis added).

Moreover, the Commission failed to establish (i) a relevant market, (ii) that CDA had market power, or (iii) that there were high entry barriers. *Id.* Given that the very purpose of the rule of reason is to determine a restraint's impact on competition, *NCAA*, 468 U.S. at 103, the ALJ's finding of

no anticompetitive effect should have been dispositive. Instead, as Judge Real stated, "the majority finds a restraint on competition without the supporting help from any of the economic principles to be applied to a full market power analysis." App. 26a.

Commissioner Azcuenaga's dissent points out the glaring shortcomings of the Commission's case on competitive effects:

> In presenting their case, complaint counsel relied on a theory of virtual *per se* illegality and did not offer evidence, even in the form of testimony of an expert economist, on fundamental elements of a rule of reason analysis, such as market definition, barriers to entry and anticompetitive effects.

App. 110a. She also laid bare the fallacy of the Commission's inferences of market power:

> *The evidence does not support the conclusion that CDA can control the price and output of dental services in California.* The majority relies on the single fact that approximately 75 percent of California dentists are members of CDA to support its finding of market power. . . . But even hypothesizing a relevant geographic market with membership similar to that statewide, entry could undercut any claimed ability to exercise market power, and the evidence suggests that entry is, in fact, easy.
>
> * * * * *
>
> If CDA had successfully controlled its members to halt advertising, why would not the other 25 percent of dentists in California who are not CDA members expand their practices by advertising, and why would not newly licensed dentists or dentists from other areas step in to take advantage of the fact that CDA members had voluntarily tied their own hands in competition to

attract patients? The Commission finds it "implausible at best" that this would happen. *A better conclusion is that it is "implausible at best" that CDA has had any significant adverse effect on competition.*

App. 145a-46a (emphasis added, citation omitted).

CDA's use of the abbreviated rule of reason to strike down a practice that has a procompetitive justification, and has been determined to have no anticompetitive effect, places it in fundamental conflict with *NCAA*, *Brown* and *Vogel*.

D. Resolution Of The Inter-Circuit Conflict Created By *CDA* Is Critical To The Proper Administration Of The Antitrust Laws

The broadened "quick look" rule of reason articulated in *CDA* is not confined to professional associations, but is applicable to all commercial enterprises. If the conflict caused by *CDA* remains unresolved, the ambiguity and overinclusiveness of the *CDA* "quick look" will have serious adverse consequences for competition and consumer welfare throughout the economy.

The Court has long recognized that uncertainty in antitrust rules chills procompetitive conduct. *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963) ("unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded"). The Antitrust Division and the Commission have noted the importance of clear, uniform antitrust rules. *See, e.g.*, Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care*, 4 Trade. Reg. Rep. (CCH) ¶ 13,153, at 20,799 (1996). Indeed, the Antitrust Division has acknowledged that "[t]he economy is harmed when lawful, efficient conduct is avoided because of legal uncertainty." Department of Justice, *Vertical Restraints Guidelines*, 4 Trade Reg. Rep. (CCH) ¶ 13,105, at 20,577 (1985) (withdrawn August 10, 1993). The potential

harm resulting from the circuit conflict created by *CDA* is particularly acute because it involves the proper application of the rule of reason, the foundation antitrust standard by which the vast majority of conduct is judged.

In contrast to the Third and Seventh Circuits, *CDA* applies the "quick look" to conduct that has no direct impact on price or output. In the Ninth Circuit's view, CDA's disclosure requirements are "fairly" or "sufficiently" naked restraints. App. 18a, 20a. The obliquity of *CDA*'s new "standard" makes it impossible for businesses to predict with any confidence the practices to which an abbreviated rule of reason will be applied. Antitrust scholars have noted the confusion caused by the lack of a uniform "quick look" standard. James A. Keyte, *What It Is And How It Is Being Applied: The "Quick Look" Rule of Reason*, ANTITRUST, Summer 1997, at 21 ("*Keyte*"). The problem is compounded by the Ninth Circuit's treatment of CDA's procompetitive justifications. *CDA* appears to require a defendant not only to proffer a plausible procompetitive justification, as in the Third and Seventh Circuits, but also to *prove* actual procompetitive benefits from the challenged conduct. App. 19a.

Placing this burden on the business whose practices are challenged virtually assures that the implementation of innovative and potentially procompetitive practices will be inhibited. Requiring proof of procompetitive benefits for any challenged conduct increases the risk that the antitrust laws' treble damage and attorneys' fees sanctions will be imposed. *Klein*, ANTITRUST, Spring 1998, at 44 ("the specter of deterring or co emning efficiency-enhancing arrangements cautions against imposing too great a burden on parties to horizontal agreements").

CDA's approach also dramatically increases the likelihood that businesses instituting new initiatives will be forced to expend substantial attorneys' fees defending their conduct, even if ultimately successful. Summary dismissal of private

antitrust suits will become virtually impossible. Increasing these risks, as *CDA* does, can only harm consumer welfare by inhibiting the implementation of innovative business strategies. *See, Barry Wright Corp.*, 724 F.2d at 235-36 (overbroad antitrust rules can "'chill' highly desirable procompetitive" conduct). *See also,* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3, 15 (1984) (condemnation of procompetitive or competitively neutral conduct is particularly costly to a competitive economy). The potential harm of *CDA*'s new abbreviated rule of reason is brought home by the fact that in this case a violation was found despite the ALJ's definitive conclusion that CDA's enforcement of the Code "has no impact on competition in any market in the State of California, particularly with respect to price and output." App. 246a. One commentator predicted this very result from the type of "quick look" analysis employed by the Ninth Circuit. *Keyte*, ANTITRUST, Summer 1997, at 24 (imposing burden on defendants places them "at a distinct disadvantage and has the potential of condemning conduct that may well be 'efficient' without the government ever having to prove anticompetitive effects").

Earlier this term, the Court acknowledged that the use of legal short-cuts that permit a court to invalidate a practice without careful examination of its competitive impact, not only suppresses procompetitive conduct, but may also inadvertently facilitate practices that harm consumers. *Khan*, 118 S. Ct. at 283. The Court admonished that summary denunciation of a practice must be avoided except where experience with the practice enables a court "to predict with confidence that the rule of reason will condemn it." *Id.* at 279. In all other cases, the delicate balancing required to protect and enhance consumer welfare can be accomplished only by thorough analysis of a practice's competitive effect under the full-scale rule of reason. As then Judge Breyer noted in *Barry Wright Corp.*:

> [W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.

724 F.2d at 234.

The Ninth Circuit contravened these basic antitrust tenets in its opinion below. It used a "quick look" to strike down conduct which admittedly is not a naked restraint, and has no anticompetitive effects. Because the circuit conflict and uncertainty caused by *CDA* risks harming, rather than enhancing competition, the Court should grant certiorari to review the Ninth Circuit's decision.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

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Dated: April 3, 1998

APPENDIX

APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA DENTAL ASSOCIATION, *Petitioner,*	)	No. 96-70409
	)	FTC Docket No.
v.	)	9259
	)	
FEDERAL TRADE COMMISSION, *Respondent.*	)	OPINION

Petition for Review of an Order
of the Federal Trade Commission

Argued and Submitted
July 16, 1997-San Francisco, California

Filed October 22, 1997

Before: Herbert Y.C. Choy and Cynthia Holcomb Hall,
Circuit Judges, and Manuel L. Real, District Judge.*

Opinion by Judge Hall; Dissent by Judge Real

SUMMARY

Business Law/Regulation of Professions

The court of appeals affirmed a decision of the Federal Trade Commission (FTC). The court held that a private trade association unreasonably restrains competition by enforcing its ethics rules to restrict truthful and nondeceptive advertising by members.

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* Hon. Manuel L. Real, United States District Judge for the Central District of California, sitting by designation.

Although membership in petitioner California Dental Association (CDA) is not a condition to obtaining a dentist's license from the State of California, about 75 percent of licensed dentists practicing in the State are members. CDA is a nonprofit corporation under California and federal tax law.

CDA provides members with various services relating to the practice of dentistry; its subsidiaries offer them financial and other services that pertain less directly to the profession. CDA membership also allows access to similar benefits from the American Dental Association, of which CDA is a part.

As a condition of membership, dentists agree to follow the CDA Code of Ethics, which authorizes discipline for unprofessional conduct and violations of state law relating to the practice of dentistry. The Code contains standards for advertising by members. On their face, the rules prohibit false or misleading advertising with respect to prices and quality of services.

The CDA's Judicial Council produces advisory opinions that elaborate on the ethical standards. These include proscriptions against the use of words or phrases of comparison, e.g., "as low as," "and up," "lowest prices." Advisory opinion 8 states that because claims as to the quality of services cannot be quantified or verified, they are likely to be false or misleading. The CDA advisory opinions substantially mirror provisions of the California Business and Professions Code.

According to CDA advertising guidelines on volume discounts, dentists must specify the amount of the nondiscounted and discounted fees, the duration of offers, verifiable fees, qualifying groups, and any other conditions. The guidelines and advisory opinions indicate that across-the-board discounts and descriptions of prices as "low" or "reasonable" do not comply with the Code.

CDA enforces its advertising restrictions. Violators are subject to a range of penalties, including expulsion. Applicants for membership must conform their advertising to CDA's standards, or face rejection.

The FTC brought a complaint against CDA, alleging that it applied the guidelines in a way that restricted truthful, nondeceptive advertising, in violation of federal law. It was the FTC's position that the restrictions on price advertising - an effective ban on volume discounts and statements describing prices as "low" or "reasonable" - were per se violations of § 1 of the Sherman Act and § 5 of the FTC Act.

CDA contended that its advertising restrictions did not violate the federal statutes because there was no evidence of an agreement in restraint of trade; there was no intent to restrain trade by enforcing them; and there was no actual restriction on truthful, nondeceptive advertising.

The FTC showed that CDA relied on the advisory opinions and guidelines in making decisions about members' advertising on appeals from disciplinary decisions, and on review of membership applications. Other evidence indicated that CDA advised component local organizations that advertising did not comply because it included "reasonable" or "affordable" language. The evidence conflicted as to whether the guidelines barred all across-the-board discounts. In some cases, the CDA advised members of objections to special offers, discounts for senior citizens and new patients, and determined that nonprice ads regarding quality of services were barred, irrespective of their truth.

An administrative law judge (ALJ) found that regardless of the truth or straightforwardness of the ads, CDA had barred members from representing that their prices were "low," "reasonable," or "affordable," and had effectively prohibited across-the-board discounts. The ALJ also concluded that CDA had considered money-back guarantees to be misleading and therefore impermissible.

The ALJ determined that the FTC had jurisdiction over CDA's activities, and that the advertising restrictions were inherently suspect and lacked a plausible efficiency justification. Although the ALJ found that CDA lacked market power, he ruled that it was unnecessary, and concluded that CDA had unreasonably restrained competition in violation of § 1 of the Sherman Act and § 5 of the FTC Act.

The FTC affirmed, ruling that the advertising restrictions were unlawful per se, and that the nonprice guidelines were unlawful under an abbreviated ("quick look") rule of reason analysis. The FTC found that CDA had sufficient market power to justify a finding of anticompetitive effect. CDA petitioned for review.

[1] The FTC has authority to prevent corporations from engaging in unfair or deceptive acts or practices. The question was whether the FTC erred in finding that CDA was a corporation within the meaning of the FTC Act. The FTC's authority turned on whether CDA is organized to carry on business for its own profit or that of its members.

[2] The FTC has consistently held that it has jurisdiction over a nonprofit entity if a substantial part of its activities provides pecuniary benefits to its members. It lacks jurisdiction if the beneficial activities are merely incidental to noncommercial activities.

[3] The FTC possessed jurisdiction over this case. Given that Congress apparently did not intend to provide a blanket exclusion for nonprofit corporations, the construction of the statute urged by CDA was too narrow. The FTC's approach of looking at whether the organization provides tangible, pecuniary benefits to its members as a surrogate for "profit" is a proper way of deciding which nonprofit organizations are subject to its jurisdiction.

[4] The CDA is engaged in substantial business activities that provide tangible, pecuniary benefits to its members.

Many of CDA's functions directly enhance the profits of members dentists. Other activities make members' practices more efficient and reduce their costs. The activities that were the subject of the FTC's order - regulation of advertising and solicitation - related particularly to the business affairs of its members. Under these circumstances, the FTC properly exercised its jurisdiction over CDA.

[5] It may be that some types of price advertising restrictions amount to bans on price competition that warrant per se condemnation. But per se analysis could not be endorsed in this case, which concerned a set of ethical guidelines promulgated for the purpose of preventing false and misleading advertising. The CDA's policies did not on their face ban truthful, nondeceptive ads. The allegation was that the rules were enforced in a way that restricts truthful advertising. This type of restriction did not warrant per se condemnation without further inquiry into its effects on competition.

[6] The rule of reason requires balancing the anticompetitive effects and possible efficiency gains or business justifications of the challenged practice. The FTC applied a quick look rule of reason analysis designed for restraints that are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry. It allows condemnation of a "naked restraint" on price or output without an elaborate industry analysis.

[7] The restraints CDA placed on price advertising amounted to a fairly "naked" restraint on price competition. Price advertising is fundamental to price competition. Restrictions on the ability to advertise prices normally makes it more difficult for consumers to find a lower price and for dentists to compete on the basis of price.

[8] Disclosure requirements can be so onerous that they actually stifle the information that consumers receive. CDA's disclosure requirements appeared to prohibit across-the board discounts because it is infeasible to disclose all the

information required. The record provided no evidence that the rule led to increased disclosure and transparency of dental pricing. On these facts, this justification required more than a quick look.

[9] The Commission also applied quick look analysis to the nonprice restrictions, which were in effect a form of output limitation. Limiting advertisements about quality and other nonprice aspects of service prevented dentists from fully describing the services they offered, and thus limited their ability to compete. The restrictions might also have affected output more directly, as quality and comfort advertising may induce customers to obtain care when they might not otherwise do so. While the danger existed that claims about quality are unverifiable and misleading, it did not justify banning all quality claims without regard to whether they were false or misleading. Under the circumstances, the restriction was a sufficiently naked restraint on output to justify a quick look analysis.

[10] Professional associations are routinely treated as continuing conspiracies of their members. CDA members are independent profit-.seeking dentists in competition with each other. By joining CDA, they effectively agree to abide by its Code of Ethics. CDA's advertising policies and enforcement activities constituted a combination or agreement within the meaning of §1 of the Sherman Act.

[11] Whatever CDA's motivation, the point of the advertising policy was to limit the types of advertising in which dentists could engage, and thereby restrict a form of competition. Good motives will not validate an otherwise anticompetitive practice.

[12] On its face, the Code extended only to false and misleading advertisements. [13] It may have been true that there was some confusion within CDA about the extent to which truthful price advertising was restricted. But there were enough examples of CDA objections to truthful ads to find that substantial evidence supported the FTC's conclusion.

[14] There was sufficient evidence that CDA restricted nonprice advertising without consideration of whether it was true or false.

[15] Although the Commission did not engage in a detailed analysis of market power, and its conclusions on this issue conflicted with those of the ALJ. they sufficed under the quick look rule of reason in light of the nature of the restraints. The relevant product market was dentistry and the relevant geographic market was local. The fact that approximately 75 percent of licensed dentists in California belong to CDA was fairly strong evidence of market share. It strongly suggested that CDA's market share was high.

[16] The Commission found that there were significant barriers to entry in the form of licensing and education that converted market share to market power. Exclusion appeared to present a significant hardship for some dentists. Even if the benefits could have been obtained elsewhere, their availability in a single package from CDA gave CDA an edge over the competition. These circumstances suggested that CDA possessed enough market power to harm competition.

[17] Given the facially anticompetitive nature of the advertising restrictions. the evidence of CDA's large market share and influence justified finding a violation under the quick look rule of reason.

Judge Real dissented, expressing the view that because CDA has nothing to do with competition in the dental profession, the FTC lacked jurisdiction.

COUNSEL

Peter M. Sfikas, Bell, Boyd & Lloyd, Chicago, Illinois, for the petitioner.

Ernest J. Isenstadt, Assistant General Counsel, Federal Trade Commission, Washington, D.C. for the respondent.

OPINION

HALL, Circuit Judge:

The California Dental Association ("CDA") petitions for review of an order of the Federal Trade Commission ("FTC") that it cease and desist from restricting certain types of advertising by its members. The issues are whether the FTC has jurisdiction over the CDA and whether substantial evidence supports its conclusion that the CDA's advertising policies, as applied, unreasonably restrain trade in violation of Section I of the Sherman Act, 15 U.S.C. § 1, and Section 5 of the FTC Act, 15 U.S.C. § 45. We have jurisdiction pursuant to 15 U.S.C. § 45(c) and affirm.

I. BACKGROUND

A. The CDA

The CDA is a trade association for licensed dentists in the State of California. It is part of the American Dental Association ("ADA") and is itself composed of 32 local "component societies." Individual dentists must be a member of a local component to belong to the CDA, and must belong to the CDA to join the ADA. CDA membership is not a condition to obtaining a dentist's license from the state, but roughly 75 percent of the practicing licensed dentists in California belong to it. The CDA is organized as a nonprofit corporation under California law and federal tax law.

The CDA provides its members a variety of services, such as lobbying, marketing and public relations, seminars on practice management, assistance in compliance with OSHA and disability requirements, continuing education. placement services, and administrative procedures for handling patient complaints. It also has several for-profit subsidiaries from

which members can obtain liability and other types of insurance, financing for equipment purchases, long-distance calling discounts, auto leasing, and home mortgages. CDA membership also allows access to a broad range of similar benefits from ADA membership.

B. The CDA's Advertising Policy

As a condition of membership, dentists agree to follow the CDA Code of Ethics, which provides that dentists may be disciplined for unprofessional conduct and violations of state law relating to the practice of dentistry. This case concerns the Code's ethical standards concerning advertising. The basic rule is set out in section 10 of the Code, which states,

> "Although any dentist may advertise. no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect."

The CDA's judicial Council. which is responsible for enforcing the Code, has released the following advisory opinions elaborating upon the ethical standard for advertising:[1]

> 2. A statement or claim is false or misleading in any material respect when it:
>
> a. contains a misrepresentation of fact;

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[1] According to the Preamble of the Code, advisory opinions are not binding on members but "may be considered as persuasive by the trial body and any disciplinary proceedings under the CDA Bylaws."

b. is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;

c. is intended or is likely to create false or unjustified expectations of favorable results and/or costs;

d. relates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors;

e. contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as "as low as," "and up," "lowest prices," or words or phrases of similar import.

4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity—for example, "low fees"—must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity.

8. Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect.

The advisory opinions substantially mirror parts of the California Business and Professions Code. *See* Cal. Bus. & Prof. Code §§ 651, 1680. The CDA claims that its Code, as explained by the advisory opinions, is intended to ensure that dentists comply with these laws.

The CDA has also issued an additional set of advertising guidelines intended to help members comply with the Code of Ethics and state law. According to the section on discount advertising. state law requires dentists offering discounts to list all of the following in the advertisement:

1. The dollar amount of the nondiscounted fee for the service;

2. Either the dollar amount of the discount fee or the percentage of the discount for the specific service;

3. The length of time that the discount will be offered:

4. Verifiable fees; and

5. Specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount.

According to the testimony of current and former CDA officials, the state Board of Dental Examiners generally does not pursue violations of state laws on advertising by dentists, and CDA has attempted to fill in the gap with its own enforcement efforts.

Both the CDA and its component societies enforce the CDA's advertising rules. Typically, components undertake the initial investigation into a member's advertising and, if possible, resolve the matter at the local level without CDA's involvement. Thus, if a component ethics committee concludes that a member's advertising is false or misleading in violation of the Code, it asks the member to discontinue or modify the advertisement. If the member does not agree or the component is unsure of how to apply the relevant standard under the Code, the case is referred to the CDA Judicial Council, which holds a hearing. If it finds a violation, and no settlement can be reached, the CDA can impose a range of penalties including censure, suspension and expulsion.

The CDA and its components also review the advertisements of applicants for membership. If the applicant does not agree to discontinue noncomplying advertisements, and the component intends to deny the application for that reason, it can refer the case to the CDA's Membership Application Review Subcommittee. After its own review, the subcommittee recommends to the component that it grant or deny membership. Applicants who are new dentists have sometimes been offered conditional admission under which they must agree to bring their advertisements into compliance within a year. Since 1990, some dentists have been admitted on condition that the component counsel" them about their advertising and that the dentist agree to comply with its advice.

C. Proceedings Before the ALJ

The Commission's complaint against the CDA alleged that the organization applied its advertising guidelines in a way that restricted truthful, nondeceptive advertising.[2] It contended that this practice violated Section I of the Sherman Act, 15 U.S.C. § 1, and consequently Section 5 of the FTC Act, 15 U.S.C. § 45. After a trial, the ALJ found that CDA had barred members from representing that their prices were "low," "reasonable" or "affordable. He also found that the CDA effectively prohibited across-the-board discounts by requiring dentists to post the nondiscounted price for all of the services subject to the discount. In both cases, the policy did not take into account whether the ads were false or misleading. In addition, he found that CDA restricted much advertising based on quality because it might imply superiority over other dentists and is difficult to verify. The CDA also considered money-back guarantees to be misleading and therefore impermissible.[3]

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[2] The Complaint does not charge the CDA's component societies.

[3] At one time, the CDA barred advertising that attempted to allay patients' fears (so-called "gentleness claims"). It has since changed its policy.

The ALJ concluded that the FTC had jurisdiction over the CDA's activities. Applying the FTC's decision in *In re Massachusetts Board of Registration in Optometry.* 110 F.T.C. 549 (1988) *("Mass. Board"),* he held that the advertising restrictions were inherently suspect and lacked a plausible efficiency justification. Although he found that the CDA lacked market power, he held that a showing of market power was unnecessary under the *Mass. Board* standard. Consequently, he determined that the CDA had unreasonably restrained competition in violation of Section 1 of the Sherman Act and Section 5 of the FTC Act.

D. Proceedings before the Commission

The majority of the Commission affirmed, on somewhat different reasoning. Chairman Pitofsky's opinion did not rely on *Mass. Board* but instead held that the restrictions on price advertising were unlawful per se.[4] It further held that the nonprice advertising guidelines were unlawful under an abbreviated rule of reason analysis. It disagreed with the ALJ and found that CDA possessed sufficient market power to justify a finding of anticompetitive effect. Commissioner Starek concurred in the result but would have applied the *Mass. Board* reasoning. Commissioner Azcuenaga dissented, arguing that there was insufficient evidence to anticompetitive acts and market power to hold CDA liable under Section 5 of the FTC Act. The CDA timely petitions for review.

II. Standard of Review

We review the FTC's findings of fact and economic conclusions under the substantial evidence standard. *See* 15 U.S.C. § 45(c); *Olin Corp. v. FTC. 986* F.2d 1295, 1297 (9th Cir. 1993). Accordingly, we uphold them if they are based on "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Id.* We do examine the

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[4] In the alternative, it held that they failed an abbreviated rule of reason analysis.

findings of the full Commission more closely when they differ from those of the ALJ, however. *Litton Ind. v. FTC,* 676 F.2d 364, 369 (9th Cir. 1982). We review issues of law de novo, but treat with some deference the FTC's informed judgment that a particular commercial practice violates the FTC Act. *See FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 454 (1986); *Olin,* 986 F.2d at 1297.

III. Jurisdiction

[1] As an initial matter, we address the FTC's jurisdiction over the CDA. The Commission has the authority to prevent "persons, partnerships or corporations" from engaging in unfair methods of competition and unfair or deceptive acts or practices. 15 U.S.C. § 45(a)(2). The question here is whether the FTC erred in finding that the CDA was a corporation within the meaning of the statute. The FTC Act's definition of corporation includes any company or association, "incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44. As a nonprofit organization under California law, the CDA is an incorporated company without shares of capital. The FTC's authority thus turns on whether the CDA is organized to carry on business for its own profit or that of its members.

[2] This court has not addressed the exact meaning of this language, and consequently the extent of the FTC's jurisdiction over nonprofit entities. The FTC has consistently held that it has jurisdiction over a nonprofit entity if a substantial part of the entity's total activities provides pecuniary benefits to its members. *See In re American Medical Assoc., 94* F.T.C. 701, 983-84 (1980), *aff'd,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court,* 455 U.S. 676 (1982) ("AMA"). It lacks jurisdiction, however, if the beneficial activities are merely incidental to noncommercial activities. *Id.*

Among the other circuits there is a split on the issue, and although the Supreme Court agreed to review the matter in *AMA,* it was equally divided and produced no opinion. *See* 455 U.S. at 676. The Eighth Circuit has held that a community blood bank was outside the FTC's jurisdiction because it was run for charitable purposes, rather than for its own profit or that of its members. *Community Blood Bank v. FTC,* 405 F.2d 1011, 1022 (8th Cir. 1969). The court held that the FTC has jurisdiction over an entity that engages "in business for profit within the traditional meaning of that language." *Id.* at 1018. Profit, the Eighth Circuit said, was gain from business or investment over and above expenditures. *Id.* at 1017. Alternatively, it defined the test as whether "dividends or other pecuniary benefits are contemplated to be paid to members." *Id.*

The Second and Seventh Circuit have applied a somewhat more expansive view of "profit." In affirming the FTC's decision in AMA. which involved an organization much more like CDA than the one in *Community Blood Bank, it* held that despite its many charitable functions, the AMA engaged in sufficient business activities to support jurisdiction. *See 638* F.2d 443, 448 (2d Cir. 1980). It distinguished *Community Blood Bank* as involving a purely charitable organization and focused on the fact that the FTC's cease and desist order concerned advertising, solicitation and contractual relationships, which relate to business rather than charitable functions. *Id.* The Seventh Circuit took a similar approach in *FTC v. Nat'l Comm'n on Egg Nutrition,* 517 F.2d 485, 487-88 (7th Cir. 1985), which upheld jurisdiction over a trade association of egg producers. It relied on the fact that the association was intended to promote the general interests of the egg industry. It also found that the association was organized for the profit of the industry even though it pursued that profit indirectly— by trying to increase egg consumption and allaying fears about cholesterol. *Id.* at 488.

[3] We agree with the approaches of the Second and Seventh Circuits and hold that the FTC possessed jurisdiction

over this case. Given that Congress apparently did not intend to provide a blanket exclusion for nonprofit corporations, *see Community Blood Bank,* 405 F.2d at 1017, we think that the construction of the statute urged by CDA is too narrow. While we agree with the Eighth Circuit that truly charitable organizations should be exempt from the FTC's reach, we would not exclude the many nonprofit corporations that conduct substantial commercial and related activities. They may not directly distribute "gain" to their members in the same sense as a for-profit corporation, but no genuine nonprofit entity does. The FTC's approach of looking at whether the organization provides tangible, pecuniary benefits to its members as a surrogate for "profit" is a proper way of deciding which nonprofit organizations are subject to its jurisdiction.

[4] Under this standard, we are confident that the facts of this case support the FTC's jurisdiction. Like the AMA and the National Commission on Egg Nutrition, the CDA is engaged in substantial business activities that provide tangible, pecuniary benefits to its members. Many of the CDA's functions, such as marketing, and lobbying for insurance and Medicare reform, directly enhance the profits of member dentists. Other activities, such as continuing education and financing assistance, indirectly make members' practices more efficient and reduce their costs. Furthermore, the activities that are the subject of the FTC's order—the regulation of advertising and solicitation—relate particularly to the business affairs of its members. The FTC is not purporting to regulate the CDA's charitable or educational activities; as in *AMA,* the Commission is concerned with CDA behavior that directly affects the profitability of its members' practices. Under these circumstances, the FTC properly exercised jurisdiction over the CDA.

IV. Analysis of the Advertising Restrictions

A. Legal Standard

1. Price Advertising

The Commission concluded that the CDA's restrictions on price advertising—namely, the effective ban on volume discounts and statements describing prices as "low" or "reasonable"—were per se violations of Section 1 of the Sherman Act and Section 5 of the FTC Act. We disagree with its use of per se analysis but sustain its alternative conclusion that an abbreviated rule of reason analysis applies.

There is some support among older cases for the FTC's use of per se scrutiny. *See United States v. Gasoline Retailers Ass'n,* 285 F.2d 688, 691 (7th Cir. 1961) (finding ban on price signs to be part of conspiracy to stabilize prices). In recent cases, however, per se analysis has only applied to price fixing, output limitations, horizontal market divisions, tying, and group boycotts. *See American Ad Management, Inc. v. GTE Corp.,* 92 F.3d 781, 784 (9th Cir. 1996). The Supreme Court, and this court, have been unwilling to expand the categories of conduct subject to the per se prohibitions. *See NCAA v.. Bd. of Regents of Univ. of Oklahoma,* 468 U.S. 85, 100 (1984); *American Ad Management,* 92 F.3d at 784-85. This is especially true where the economic impact of the restraint is not immediately obvious, *see Indiana Federation of Dentists, 476* U.S. at *458-59,* and where the restraint is a rule adopted by a professional organization. *See National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 692-96 (1978).*

[5] We do not doubt that the FTC has gained considerable experience with advertising restrictions since *AMA. See Mass. Board,* 110 F.T.C. at 549. It may be correct that some types of price advertising restrictions amount to bans on price competition that warrant per se condemnation. *See*

Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 344 (1982) ("Once experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable."). But we cannot endorse the use of per se analysis in this case, which concerns a set of ethical guidelines promulgated by a professional organization for the apparent purpose of preventing false and misleading advertising. Unlike the situation in *AMA* and *Mass. Board,* the CDA's policies do not, on their face, ban truthful, nondeceptive ads. The allegation instead is that the rules have been enforced in a way that restricts truthful advertising. The value of restricting false advertising (which may itself violate the FTC Act) counsels some caution in attacking rules that purport to do so but merely sweep too broadly. As a result, we do not believe that this type of restriction warrants per se condemnation without further inquiry into its effects on competition.

[6] We therefore analyze the restraints under the rule of reason, which requires balancing the anticompetitive effects and possible efficiency gains or business justifications of the challenged practice. *See Professional Engineers, 435 U.S.* at 691. In this case, the FTC applied an abbreviated, or "quick look," rule of reason analysis designed for restraints that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry. *See NCAA, 468 U.S.* at 109-10 & n.39 ("The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." (internal quotations omitted)). It allows the condemnation of a "naked restraint" on price or output without an "elaborate industry analysis." *Id.* at 85. Although we have held that the quick look analysis should be the exception, rather than the rule, *see American Ad Management,* 92 F.3d at 789, we conclude that the FTC properly applied it here.

[7] The restrictions CDA placed on price advertising amounted in practice to a fairly "naked" restraint on price competition itself. As the Commission and courts have

found, price advertising is fundamental to price competition—one of the principal concerns of the antitrust laws. It plays an "indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona,* 433 U.S. 350, 364 (1977). Restrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price. *See id.; Morales v. Trans World Airlines,* 504 U.S. 374, 388 (1992). This is particularly true of a restriction on advertising price discounts, a significant basis of price competition. *See Mass. Board,* 110 F.T.C. at 605.

[8] The complexity in this case is that CDA asserts as justification for its restrictions the legitimate, indeed procompetitive, goal of preventing false and misleading price advertising. In particular, it claims, the rules simply require more disclosure, which enhances rather than limits price competition. We agree that as a general matter disclosure can augment competition and increase market efficiency by providing consumers more information. The problem is with the nature and amount of disclosure required. As the Supreme Court has recognized in other contexts, disclosure requirements can become so onerous that they actually stifle the information that consumers receive. *Morales,* 504 U.S. at 389-90. In practice, CDA's disclosure requirements appear to prohibit across-the-board discounts because it is simply infeasible to disclose all of the information that is required. Indeed, the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing. Consequently, we do not think this possible justification, on these facts, requires more than a quick look under the rule of reason.

2. Nonprice Advertising

[9] The Commission also applied the quick look rule of reason analysis to the nonprice restrictions, such as the effective ban on quality and superiority claims. These restrictions are in effect a form of output limitation, as they

restrict the supply of information about individual dentists' services. *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 1505 at 693-94 (Supp. 1997). Limiting advertisements about quality, safety and other nonprice aspects of service prevents dentists from fully describing the package of services they offer, and thus limits their ability to compete. The restrictions may also affect output more directly, as quality and comfort advertising may induce some customers to obtain nonemergency care when they might not otherwise do so. CDA contends that claims about quality are inherently unverifiable and therefore misleading. While this danger exists, it does not justify banning all quality claims without regard to whether they are, in fact, false or misleading. Under these circumstances, we think that the restriction is a sufficiently naked restraint on output to justify quick look analysis. We also note in this regard the Supreme Court's repeated holdings that the scope of inquiry under the rule of reason is intended to be flexible depending on the nature of the restraint and the circumstances in which it is used. *See Indiana Federation of Dentists,* 476 U.S. at 459; *Professional Engineers,* 435 U.S. at 688, 692.

B. Substantial Evidence

CDA challenges whether substantial evidence supports the FTC's conclusion that CDA's policies violated the rule of reason. Finding a violation under the rule of reason requires a showing of (1) an agreement, conspiracy or combination between two or more entities, (2) intent to restrain competition, (3) actual injury to competition, and (4) an unreasonable restraint as determined by balancing the harm caused by the restraint and any procompetitive benefits from it.[5] *American Ad Management,* 92 F.3d at 788-89. In particular, CDA contends that the Commission has not produced evidence that there was an agreement with the intent to restrain trade, that CDA in fact restricted truthful, nondeceptive advertising, and that CDA had sufficient

[5] The restraint must also affect interstate commerce, but the parties do not address this issue on appeal.

market power for its regulations to actually harm competition.

1. Agreement

[10] CDA first argues that there was no evidence of an agreement in restraint of trade. We disagree. Professional associations are "routinely treated as continuing conspiracies of their members." *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S.* 492, 500 (1988) (quoting 7 P. Areeda, Antitrust Law ¶ 1477, at 343 (1986)). CDA members are independent, profit-seeking dentists in competition with each other. By joining the CDA, they effectively agree to abide by the CDA's Code of Ethics. CDA's advertising policies and accompanying enforcement activities thus constitute a combination or agreement within the meaning of Section 1 of the Sherman Act.

2. Intent

[11] CDA further argues that it did not intend to restrain trade. Instead, it contends, the purpose of the Code of Ethics was merely to comply with state law. But whatever its motivation, the point of the advertising policy was clearly to limit the types of advertising in which dentists could engage, and thereby restrict a form of competition. "Good motives will not validate an otherwise anticompetitive practice." *NCAA, 468* U.S. at 101 n.22.

3. Effect of Restrictions

[12] A more difficult question is whether substantial evidence supports the Commission's conclusion that CDA in fact restricted truthful, nondeceptive advertising. On its face, the Code only extends to false and misleading advertisements. The Commission found that through its pattern of enforcement, the CDA went beyond the literal language of its rules to prohibit ads that were in fact true and

nondeceptive.[6] The CDA's advisory opinions and guidelines indicate that across-the-board discounts and descriptions of prices as "reasonable" or "low" do not comply with the Code. Although these guidelines are not directly binding on member dentists, the Commission staff presented evidence that the CDA has relied on them in making decisions about members' advertising on appeals from disciplinary decisions by component societies and on review of membership applications referred by components. In numerous cases, the CDA advised components that advertising did not comply because it included "reasonable" or "affordable" language.

[13] Similar evidence supports its findings on the issue of discounts. Although Dr. Kinney, one member of the Judicial Council, testified that the guidelines might not bar all across-the-board discounts, other testimony is to the contrary. For example, one member suggested that advertising a "senior citizen discount, standing alone, would violate the rules. The Commission's opinion cites numerous cases in which the CDA advised members of objections to special offers, senior citizen discounts, and new patient discounts, apparently without regard to their truth. It may be that there is some confusion even within the CDA about the extent to which truthful price advertising is restricted. But there are enough examples of CDA objections to truthful ads to find that substantial evidence supports the FTC's conclusion.

[14] In terms of the nonprice advertising, advisory opinion eight expressly states that claims as to the quality of services are inherently likely to be false or misleading. The evidence before the ALJ demonstrates that the CDA,

[6] CDA also contends that any anticompetitive harm was caused by the independent actions of its components, over which it had no control. But CDA set the overall standards used by the components and in numerous cases cited by the Commission was directly involved in disciplinary and admission proceedings for individual dentists. There was enough evidence to conclude that CDA itself was responsible for the anticompetitive activity.

following this guideline, has often advised components that the Code of Ethics bars such claims, without any inquiry into whether or not, in a particular case, they were true. On numerous occasions, CDA also informed its components that guarantees were barred by state law. Taken together, there is sufficient evidence that the CDA restricted nonprice advertising without any particular consideration of whether it was true or false.

4. Market Power

[15] Showing that the restraints harmed competition under the rule of reason typically requires some analysis of market power. Although the Commission did not engage in a detailed analysis of market power, and its conclusions on this issue conflict with those of the ALJ, we conclude that they suffice under the quick look rule of reason in light of the nature of the restraints involved. The FTC correctly concluded that the relevant product market is dentistry and the relevant geographic market is local. The fact that approximately 75 percent of licensed dentists in California belong to the CDA is fairly strong evidence of market share. While this fact alone does not indicate what the market shares are in particular localities, it strongly suggests that at least in many, CDA's market share is quite high.

[16] The Commission also found that there are significant barriers to entry in the form of licensing and education which tend to convert this market share into market power. In addition, CDA membership offers sufficient benefits that exclusion appears to present a significant hardship for some dentists. CDA membership is necessary for membership in the ADA, which itself provides prestige and valuable benefits. The record does not show that dentists are willing to forego CDA membership rather than give up their advertisements. In fact, some dentists stated they feared losing the economic benefits of membership, such as insurance, if they were expelled or denied membership because of advertising. Even if the benefits from membership can be obtained elsewhere, their availability in a single

package from CDA certainly gives CDA an edge over other options. Taken together, these circumstances suggest that CDA possesses enough market power to harm competition through its standard setting in the area of advertising.

[17] It is true that the FTC did not engage in the full economic analysis of market power often required under the full rule of reason. But as Professor Areeda argues, "What constitutes sufficient proof [of market power] will vary enormously both with the type of restraint and with common knowledge. . . . If large scale professional organizations like the American Medical Association promulgate rules against advertising, a court will see a significant restraint that needs to be analyzed without careful market definition." 7 P. Areeda, Antitrust Law ¶ 1503, at 377. Given the facially anticompetitive nature of both the price and nonprice advertising restrictions, the evidence of the CDA's large market share and influence justifies finding a violation under the quick look rule of reason.

Conclusion

The FTC correctly exercised its jurisdiction over the CDA. Substantial evidence supports the FTC's conclusion that the advertising rules of the CDA, as applied to truthful and non-deceptive advertisements, violate Section 1 of the Sherman Act and Section 5 of the FTC Act under an abbreviated rule of reason analysis. Accordingly, we AFFIRM the decision of the FTC and ENFORCE its cease and desist order.

REAL, District Judge, dissenting.

I dissent.

The history and background of this matter has been well delineated by the majority so I need not repeat it here.

I dissent because I believe that the California Dental Association (CDA) is a non-profit professional association that does not operate commercially. Rather the CDA simply makes available to its members services that can best be provided through a group in order to obtain the best price and service from outside business enterprises; i.e., insurance companies, equipment suppliers, telephone services, auto leasing and financing. The CDA has nothing to do with competition in the dental profession. As such the California Dental Association is not subject to the authority of the Federal Trade Commission. *Community Blood Bank of Kansas City Area, Inc., v. F.T.C.,* 405 F.2d 1011 (8th Cir. 1969). These nonprofit membership organizations have no place in the commercial world of the F.T.C. The majority appears to base their F.T.C. jurisdictional ruling on "pecuniary benefits" that do not in any way result from the business of the Association but rather from the individual action of the members in group procurement to obtain the best price from outside sources that compete for their business. The members are true consumers of competitive products offered to them through their group— the CDA.

Assuming arguendo that the F.T.C. has jurisdiction to regulate the CDA, the majority's approval of the quick look analysis to the Rule of Reason used by the F.T.C. cannot be supported. The rules of the CDA as presented to the F.T.C. are not per se a restraint on competition in the dental profession nor are they sufficiently anti-competitive on their face to eschew a full-blown rule of reason inquiry.

What the CDA was attempting to accomplish by its rules concerning advertising did not amount to a restraint on price competition. In its efforts to self-monitor the dental

profession in the relationship of its members to the public, the CDA was attempting to guard against misleading or unreliable advertising by its members. What the CDA was monitoring was that dentists who wishes to advertise discounts would have to fully disclose to the public the nature of the discounts. Full disclosure is neither price fixing nor is it a ban on non-deceptive advertising. The advertising provisions of the CDA's Code of Ethics does not in any way infringe upon the rights of any member to advertise providing the advertising is not "false or misleading in any material respect." If Section 10 of the Code is applied erroneously to any member's advertising there are provisions to appeal the decision to the CDA Judicial Council, and of course ultimately to the courts of the State of California.

The majority agrees that, at worst, a Rule of Reason inquiry is applicable to the anti-competition claims of the F.T.C. They also agree that the Rule of Reason is the "rule" and that the quick look is the exception. Yet in the absence of any naked restraints they still attempt to satisfy the use of the exception. Furthermore, the majority funds a restraint on competition without the supporting help from any of the economic principles to be applied to a full market power analysis.

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

DOCKET NO. D-9259

IN THE MATTER OF:

California Dental Association

ORDER

B191356

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: Robert Pitofsky, Chairman
Mary L. Azcuenaga
Janet D. Steiger
Roscoe B. Starek, III
Christine A. Varney

In the Matter of	)	
	)	
	)	
CALIFORNIA DENTAL ASSOCIATION, a corporation.	)	Docket No. 9259
	)	
	)	
	)	

FINAL ORDER

The Commission has heard this matter on the appeal of Respondent California Dental Association from the Initial Decision, and on briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to affirm the Initial Decision, and to issue this Final Order. Accordingly, the Commission enters the following Order.

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Respondent" or "CDA" means the California Dental Association, its directors, trustees, councils, committees, boards, divisions, officers, representatives, delegates, agents, employees, successors and assigns.

B. "Component societies" means those dental societies or dental associations defined as component societies in the June 1986 edition of CDA's Bylaws. In the event that CDA's Bylaws are amended to denominate component societies differently or to define or describe a new category of dental societies or associations that replace or are substantially similar to the component societies defined in the June 1986 edition of CDA's Bylaws, "component societies" means those dental societies or dental associations as well.

C. "Person" means any natural person, corporation, partnership, unincorporated association, or other entity.

D. "Restricting" includes taking any action against a dentist based on the advertising practices of the dentist's employer.

II.

IT IS FURTHER ORDERED that respondent, directly or indirectly, or through any corporate or other device, in or in connection with its activities as a professional association in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, restricting, regulating, impeding, declaring unethical, or interfering with the advertising or publishing by any person of the prices, terms or conditions of sale of dentists' services, or of information about dentists' services, facilities or equipment which are offered for sale or made available by dentists or by any organization with which dentists are affiliated, including, but not limited to, advertising or publishing:

1. Superiority claims;
2. Comparative claims;
3. Quality claims;
4. Subjective claims and puffery;
5. Prices, including discounted prices;
6. Promises to refund money to dissatisfied customers;
7. Claims that include the use of adjectives or superlatives to describe any offered service; and
8. Exclusive methods or techniques.

B. Prohibiting, restricting, regulating, impeding, declaring unethical, or interfering with the solicitation of patients, patronage, or contracts to supply dentists' services by any dentist or by any organization with which dentists are affiliated, through advertising or by any other means, including, but not limited to, the distribution of business cards and forms containing a dentist's name, business address, or telephone number in connection with dental screenings of children at public and private schools.

C. For a period of ten (10) years after the date this Order becomes final, inducing, requesting, suggesting, urging, encouraging, or assisting any non-governmental person or organization to take any action that if taken by respondent would violate Part II.A. or II.B. of this Order.

PROVIDED, HOWEVER, that nothing contained in this Order shall prohibit respondent from formulating, adopting, disseminating to its component societies and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence.

PROVIDED FURTHER, that nothing in this Order shall prohibit respondent from encouraging its members to obey state law or from disciplining any member as a result of that member's reprimand, discipline, or sentence by any court or any state authority of competent jurisdiction.

III.

IT IS FURTHER ORDERED that respondent shall:

A. Within sixty (60) days after the date this Order becomes final, remove from respondent's Code of Ethics and from its Bylaws and any other policy statement or guideline of respondent, any provision, interpretation, or policy statement that is inconsistent with the provisions of Part II of this Order, including but not limited to:

1. Sections 10 and 22 of respondent's Code of Ethics; and
2. Advisory Opinions 2(c), 2(d), 3, 4, and 8 to Section 10 of respondent's Code of Ethics.

B. Terminate for a period of one (1) year respondent's affiliation with any component society within one hundred and twenty (120) days after respondent learns or obtains information that would lead a reasonable person to conclude that said component society has, after the date this Order becomes final, engaged in any act or practice that if committed by respondent would be prohibited by Part II of this Order; unless prior to the expiration of the one hundred twenty (120) day period, said component society informs respondent by a verified written statement of an officer of the society that the component society has eliminated and will not reimpose the restraint(s) in question, and respondent has no grounds to believe otherwise.

IV.

IT IS FURTHER ORDERED that respondent shall:

A. Within ninety (90) days after the date this Order becomes final, publish in the Journal of the California Dental Association ("CDA Journal"), or any successor publication, with such prominence and in the same size type as feature articles are regularly published in the CDA Journal, or any successor publication, and with customary form and scope of distribution of the CDA Journal, or any successor publication, and separately distribute by first class mail to each of its component societies and to each of its members:

1. This Order, the accompanying complaint, and an announcement in the form shown in Appendix A to this Order; and

2. Any documents revised pursuant to Part III.A. of this Order.

B. For each person who, because of the advertising or solicitation practices of the person or the person's employer, currently is subject to a CDA disciplinary order, or currently is suspended from membership in CDA:

1. Within thirty (30) days after this Order becomes final, distribute by first class mail a copy of this Order, the accompanying complaint, and an announcement in the form shown in Appendix B to this Order;

2. Within one hundred and twenty (120) days after the date this Order becomes final, (a) review the person's file, and (b) determine whether the suspension or disciplinary order is consistent with Part II of this Order; and

3. Within one hundred and twenty (120) days after the date this Order becomes final, send by

first class mail a letter notifying the person whether CDA has lifted the suspension and or vacated the disciplinary order, and, if not, detailing the reasons for maintaining the suspension or retaining the disciplinary order.

C. For each person currently not a member of CDA who, because of the advertising or solicitation practices of the person, or of the person's employer:

1. has been expelled from CDA during the ten (10) year period preceding the date this Order becomes final; or

2. has been denied membership in CDA, or any CDA component, during the ten (10) year period preceding the date this Order becomes final; or

3. was contacted by CDA, or any CDA component, during the ten (10) year period preceding the date this Order becomes final, and who subsequently resigned from CDA;

take the following steps:

Within one hundred and twenty (120) days after this Order becomes final, distribute by first class mail a copy of this Order, the accompanying complaint, an announcement in the form shown in Appendix C to this Order, and an application form for membership in CDA; and

Within forty-five (45) days after the date an application from such person for membership is received, (i) review the application, and (ii) send by first class mail a letter notifying the person whether membership has been granted, and, if not, detailing the reasons for the denial.

D. For five (5) years after the date this Order becomes final, distribute by first class mail a copy of this Order, the accompanying complaint, and an announcement in the form shown in Appendix A to this Order to each person who applies for membership in CDA within thirty (30) days after CDA receives an application from such person.

V.

IT IS FURTHER ORDERED that respondent shall:

A. For a period of three (3) years after the date this Order becomes final, create and maintain a written record in each instance in which respondent or one of its component societies takes action with respect to advertising for the sale of dental services. The record required by this paragraph shall, at a minimum, clearly specify the particular representation that is alleged to be false or deceptive, and the basis for concluding that the particular advertisement is false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

B. Within six (6) months after the date that this Order becomes final, and every six (6) months thereafter for a period of three (3) years, file with the Federal Trade Commission, Bureau of Competition, Division of Compliance, copies of each and every record created pursuant to Part V.A. of this Order.

VI.

IT IS FURTHER ORDERED that respondent shall:

A. Establish, within sixty (60) days after the date this Order becomes final, and maintain for a period of five (5) years thereafter, a compliance program to aid in ensuring that respondent and its component societies act in conformance with the requirements of Parts II through V of this Order. Said compliance program shall include, at a minimum:

1. Establishing a compliance officer or committee that shall supervise review of the activities of respondent and its component societies with respect to advertising; and

2. Establishing procedures to ensure that respondent receives written notice of all action, whether formal or informal, taken by respondent's component societies with respect to advertising.

B. Within one hundred and twenty (120) days after the date this Order becomes final, file with the Federal Trade Commission a verified report in writing setting forth in detail the manner and form in which respondent has complied and is complying with this Order.

C. Within one (1) year after the date this Order becomes final, annually thereafter for a period of five (5) years, and at such other times as the Federal Trade Commission may by written notice to respondent request, file a verified report in writing with the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this Order, and setting forth in detail any action taken in connection with the activities covered by this Order, including, but not limited to, any advice or interpretation rendered with respect to advertising or solicitation, and all written communications, all summaries of oral communications, and all disciplinary actions taken with respect to advertising or solicitation.

D. For a period of five (5) years after the date this Order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts II, III, IV, and V of this Order, including but not limited to any advice or interpretation rendered with respect to advertising or solicitation, and all written

communications, all summaries of oral communications, and all disciplinary actions taken with respect to advertising or solicitation.

E. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed changes in respondent, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that this Order will terminate twenty (20) years from the date it becomes final, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later;

PROVIDED, HOWEVER, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this Order that terminates in less than twenty (20) years;

B. This Order's application to any respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after the Order has terminated pursuant to this paragraph.

PROVIDED FURTHER, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this paragraph as though the complaint was never filed, except that the Order will not terminate between the date such complaint is filed and the

later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Azcuenaga dissenting.

Donald S. Clark
Secretary

Seal

Argued: November 15, 1995
Issued: March 25, 1996

Attachments:
1) Appendices A-C
2) Opinion of the Commission
3) Dissenting Opinion of Commissioner Azcuenaga
4) Opinion of Commissioner Starek, Concurring in Part and Dissenting in Part

APPENDIX A

[Date]

ANNOUNCEMENT

The Federal Trade Commission has issued an order against the California Dental Association ("CDA"). This order provides that CDA may not prohibit its members from, or restrict its members in, engaging in truthful, nondeceptive advertising or solicitation.

As a result of the order, CDA may not interfere if its members or their employers wish to:

1. advertise or publish truthful, nondeceptive:

   (a) superiority claims;

   (b) comparative claims;

   (c) quality claims;

   (d) subjective claims and puffery;

   (e) prices, including discounted prices;

   (f) promises to refund money to dissatisfied customers;

   (g) claims that include the use of adjectives or superlatives to describe any offered service; or

   (h) exclusive methods or techniques.

2. engage in the solicitation of patients, including by means of distributing business cards and forms containing a dentist's name, business address, or

telephone number in connection with dental screenings of children at public or private schools.

The order does not prevent CDA from formulating and enforcing reasonable ethical guidelines prohibiting representations, including unsubstantiated or unverifiable representations, that CDA reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or guidelines prohibiting the solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence.

In particular, the order means that as long as CDA's members do not engage in falsehood or deception, CDA cannot prevent or discourage them from advertising or otherwise soliciting patients, except with respect to "uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence."

For more specific information, you should refer to the FTC order itself, a copy of which is enclosed.

Bernard L. Allamano
General Counsel
California Dental Association

APPENDIX B

[Date]

ANNOUNCEMENT

As you may be aware, the Federal Trade Commission has issued an order against the California Dental Association ("CDA"). This order provides that CDA may not prohibit its members from, or restrict its members in, engaging in truthful, nondeceptive advertising or solicitation. In addition, the order requires CDA, within 45 days after the order became final, to review (a) all current suspensions of CDA membership, and (b) all disciplinary orders, imposed because of the advertising or solicitation practices of a member or the advertising or solicitation practices of the member's employer. The order requires CDA, within 60 days after the order became final, to inform each such member in writing that the suspension has been lifted or the disciplinary order vacated; if not, CDA is required to give detailed reasons for maintaining the suspension or retaining the disciplinary order.

CDA is currently reviewing your case to determine whether the disciplinary action taken against you is in accordance with the FTC order. For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed.

If you have any questions concerning the status of CDA's review of your case, feel free to contact the Association at ( ). You may also contact the Federal Trade Commission.

Bernard L. Allamano
General Counsel
California Dental Association

APPENDIX C

[Date]

ANNOUNCEMENT

As you may be aware, the Federal Trade Commission has issued an order against the California Dental Association ("CDA"). The order provides that CDA may not prohibit its members from, or restrict its members in, engaging in truthful, nondeceptive advertising or solicitation. Pursuant to the order, CDA is sending a membership application form to dentists, such as you, who because of their advertising or solicitation practices, or the advertising or solicitation practices of their employers:

1. have been expelled from CDA during the ten (10) year period preceding the date the order became final;

2. have been denied membership in CDA, or any CDA component, during the ten (10) year period preceding the date the order became final; or

3. were contacted by CDA, or any CDA component, during the ten (10) year period preceding the date the order became final, and who subsequently resigned from CDA.

The order requires CDA, within 45 days after it receives an application from any such person, to act on the application and inform the applicant whether membership has been granted and, if not, to detail the reasons for the denial.

CDA encourages you to apply for membership. If you apply for membership, your application will be considered in accordance with the terms of the FTC order. For more specific information, you should refer to the FTC order itself. A copy of the order is enclosed.

If you have any questions concerning application, feel free to contact the Association at ( ). You may also contact the Federal Trade Commission.

Bernard L. Allamano
General Counsel
California Dental Association

OPINION OF THE COMMISSION

By Pitofsky, Chairman:

This is a case in which a large percentage of dentists located in California, operating through their trade association, the California Dental Association ("CDA"), placed unreasonable restrictions on members' truthful and nondeceptive advertising of the price, quality, and availability of their services. We find such restrictions on competition through regulation of advertising to be a violation of Section 5 of the Federal Trade Commission Act. In reaching that conclusion, we find that CDA is not a "not for profit" organization beyond the reach of FTC authority, that its actions affect interstate commerce, and that CDA and its members are capable of conspiracy and have conspired to impose these advertising restrictions.

The order that we impose leaves CDA free to regulate false and misleading forms of marketing and advertising by its members, but does not allow it to impose broad categorical bans on truthful and nondeceptive advertising of the price, quality, or availability of dental services.

I. BACKGROUND

The complaint in this case, issued on July 9, 1993, charges respondent with restraining competition among dentists in California in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1995) ("FTC Act" or "Act"), by placing unreasonable restrictions on its members' truthful and nondeceptive advertising of the price, quality, and availability of their services. After extensive pretrial discovery, a three-week trial, and post-trial motions, the record was closed on April 20, 1995, and a decision and final order were entered by the administrative law judge ("ALJ"), Lewis F. Parker, on July 17, 1995.

The ALJ first rejected CDA's arguments that the Commission lacks jurisdiction because CDA is not

"organized to carry on business for its own profit or that of its members," within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44, and that its activities do not restrain or affect interstate commerce within the meaning of Sections 4 and 5 of the Act, 15 U.S.C. §§ 44 and 45. The ALJ found that CDA's actions affect interstate commerce, ID at 65-67[1], and that, notwithstanding CDA's status as a nonprofit corporation, the association confers a substantial pecuniary benefit on its members so as to place it within the Commission's jurisdiction under *Community Blood Bank of Kansas City Area, Inc. v. F.T.C.*, 405 F.2d 1011 (8th Cir. 1969), and *American Medical Association*, 94 F.T.C. 701 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982) ("AMA"), ID at 67-71. The ALJ next rejected CDA's contention that, just as a corporation cannot legally conspire with its wholly owned subsidiary, CDA could not, as a matter of law, conspire with its members and local components. The ALJ determined that unlike a corporation whose economic interests are fused with those of its wholly owned subsidiary, CDA is an association of competing dentists who are legally capable of conspiracy and who, by agreeing to abide by the Code of Ethics, have conspired with one another and with CDA and its local component societies to restrict advertising. ID at 71-72.

Turning to the legality of the individual restraints, the ALJ concluded that the members of CDA by agreement had unreasonably withheld from the public information regarding the prices, discounts, quality, superiority, guarantees, and availability of services of member dentists, as well as information about their use of procedures to diminish

[1] The following abbreviations are used in this opinion:

ID - Initial Decision of the ALJ
IDF - Numbered Findings in the ALJ's Initial Decision
CX - Complaint Counsel's Exhibit
RX - Respondent's Exhibit
T - Transcript of Trial before the ALJ

patients' anxiety. ID at 74-75. The complaint did not challenge the right of members of CDA through their association to suppress advertising that was misleading or deceptive or otherwise caused unavoidable and unreasonable harm to consumers. Accordingly, the ALJ enjoined CDA from further interference with advertising by member dentists, except insofar as CDA has a reasonable basis for concluding, *i. e.*, reasonably believes, that such advertising is false or deceptive within the meaning of Section 5 of the FTC Act, or with respect to the solicitation of patients who may be particularly vulnerable to undue influence. ID at 80-82.

CDA appeals from the Initial Decision on the grounds that the ALJ erred in concluding that CDA is a corporation within the meaning of Section 4 of the FTC Act, that CDA is capable of conspiring with its members and its component societies, and that CDA's actions were unlawful under Section 5 of the Act[2]. Our analysis of the liability issues and assessment of certain facts differ from the ALJ's but we nonetheless reach the same conclusion on liability and, accordingly, affirm the Initial Decision as modified below and adopt the ALJ's findings of fact except insofar as they are inconsistent with this opinion[3].

[2] CDA does not appear to challenge the ALJ's conclusion that its activities had the requisite nexus to interstate commerce, and, in any event, we affirm the ALJ's conclusion on this score without further elaboration.

[3] Complaint Counsel's Motion To Correct The Record And To Supplement A Response Given At The Oral Argument (filed on December 6, 1995), and Respondent's Motion For Leave To File CDA's Response To Questions Posed During Oral Argument Regarding Whether CDA Is Responsible For The Actions Of The Components (filed on March 7, 1996) are hereby granted. Respondent's Response To Questions Posed During Oral Argument Regarding Whether CDA Is Responsible For The Actions Of The Components (filed as an attachment to the March 7, 1996 motion), and Complaint Counsel's Reply To CDA's Response To Certain Questions Posed During Oral Argument (filed on March 18, 1996), have been considered by the Commission, and are disposed of by the Final Order and Opinion of the Commission.

II. RESPONDENT

CDA is a professional association, organized under California law as a non-profit corporation, with its principal place of business in Sacramento, California. CDA is composed of 32 local component societies, and is itself a constituent member of the American Dental Association ("ADA") (which is not a party to this suit). IDF 3-4. To qualify for membership at the state level, CDA requires a dentist to be a member of the local component society in the jurisdiction where the dentist practices. Similarly, a California dentist is not eligible for membership in the ADA without membership in CDA. IDF 3-4. Each CDA member must abide by the codes of ethics of the local component to which the dentist belongs, the CDA, and the ADA, CX 1450-Y; IDF 5, and expressly promises to do so in his or her application by signing the following statement:

> "I CERTIFY that I have read the *Constitution, Bylaws, Code of Ethics* and the *Principles of Ethics* of the dental society, the California Dental Association, and the American Dental Association, and upon submission of this application I will comply with the *Constitution, Bylaws, Code of Ethics* and the *Principles of Ethics* of the dental society, the California Dental Association, and the American Dental Association, and I further agree that I will recognize the authorized officers of said society and said associations as the proper and sole authorities to interpret all areas of professional conduct and will at all times abide by and be governed by their interpretations."CX 1258-E.

Each organization's code and bylaws must not conflict with those of the association of which it is a part. CX 1450-I; IDF 4.

The CDA has more than 19,000 members. Between 13,500 and 13,700 are in active practice, representing around 75 percent of the practicing dentists in California. IDF 2. In some communities, CDA may represent an even larger share of the practicing dentists. For example, in 1994 the Mid-

Peninsula Dental Society, whose region included Palo Alto, claimed to represent over 90 percent of practicing dentists in its area. CX 1433.

CDA is run on the principle of parliamentary supremacy. Its House of Delegates, composed of about 200 CDA members, chosen mainly by the components, has the power to amend CDA's articles of incorporation, adopt and amend its Code of Ethics, determine and assess dues, adopt an annual budget, grant or revoke the charters of its component societies, and elect its officers, Council members, and delegates to the ADA House of Delegates. IDF 9; CX 1450-K; CX 1472-A. Aside from a managing Board of Trustees and a number of standing committees, the CDA operates ten Councils, one of which is the Judicial Council, which is charged with interpreting and enforcing CDA's Code of Ethics. IDF 10-23. The Judicial Council's Membership Application Review Subcommittee ("MARS"), in turn, examines whether applicants have complied with the Code of Ethics. IDF 14; IDF 157.

III. JURISDICTION

CDA challenges the ALJ's conclusion that it is a corporation "organized to carry on business for its own profit or that of its members," within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44. First, it maintains that the ALJ applied the wrong legal standard, arguing that the ALJ ignored the two-pronged approach set forth in *College Football Association*, 5 Trade Reg. Rep. (CCH) ¶ 23,631 (July 8, 1994) ("CFA"), by applying the test laid out in the Commission's earlier decision in *American Medical Association*, 94 F.T.C. 701. Second, CDA argues that dentists do not in fact derive any pecuniary benefit from their membership in CDA and that any activity that might be characterized as for profit is ancillary to its nonprofit mission and therefore does not suffice to confer jurisdiction upon the FTC. We disagree.

Under Section 5, as amended, the Commission is authorized to "prevent persons, partnerships, or corporations," with certain exceptions not relevant here, "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."15 U.S.C. § 45(a)(2). Section 4, as amended, in turn, defines the term "corporation":

> "'Corporation' shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members."15 U.S.C. § 44.

The statute does not further specify the boundary of the for-profit limit to our jurisdiction (or nonprofit exemption as it is alternatively known), and the test we apply was first articulated in *Community Blood Bank of Kansas City Area, Inc. v. F.T.C.*, 405 F.2d 1011 (8th Cir. 1969). In that case, the Eighth Circuit rejected the notion that a corporation's nonprofit organizational form places it beyond the Commission's jurisdiction. An examination of the legislative history of the Act led the court to conclude that "Congress did not intend to provide a blanket exclusion of all non-profit corporations, for it was also aware that corporations ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members."405 F.2d at 1017. See also *F.T.C. v. National Commission on Egg Nutrition*, 517 F.2d 485, 487-88 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976). The Eighth Circuit explained that the nonprofit exemption extends only to

corporations that are "in law and in fact charitable," 405 F.2d at 1019, and concluded:

> "[U]nder § 4 the Commission lacks jurisdiction over nonprofit corporations without shares of capital which are organized for and actually engaged in business for only charitable purposes, and do not derive any 'profit' for themselves or their members within the meaning of the word 'profit' as attributed to corporations having shares of capital."*Id.* at 1022.

We applied this standard in AMA, 94 F.T.C. 701, where we ultimately found that the American Medical Association had violated Section 5 of the FTC Act by restricting advertising and solicitation by its members. In finding jurisdiction we rejected the AMA's claim that the statutory term "profit" was limited to direct gains distributed to its members. Nor did we accept the organization's claim that the mere existence of substantial, eleemosynary activities would place it beyond the purview of the statute. We agreed, instead, with the ALJ, who had decided that the Commission can "assert jurisdiction over nonprofit organizations whose activities engender a pecuniary benefit to its members if [those] activit[ies are] a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity."*Id.* at 983 (citation omitted). We have since adhered to that formulation of the reach of our jurisdiction over nonprofit organizations. See, *e.g.*, *Michigan State Medical Society*, 101 F.T.C. 191, 283-84 (1983).

As the ALJ correctly observed, our subsequent decision in *CFA* is consistent with *AMA*. See ID at 68. *CFA* addressed the question whether a nonprofit organization, all of whose members are not for-profit entities, is subject to the Commission's jurisdiction when it engages in commercial activity and distributes the income earned from that activity to its members. As we noted in *CFA*, our jurisdictional analysis in that case did not call *AMA* into question. We reiterated that "a finding that a substantial part of an association's activities engender[s] pecuniary benefits for

profit-seeking members is sufficient to establish that the association is organized to carry on business 'for the profit' of its members."*Id.* at 23,362. *AMA* proved insufficient, however, to decide the jurisdictional question in *CFA,* since "a finding that such activities engender pecuniary benefits for entities that are not for-profit is not [a sufficient basis to establish jurisdiction]."*Id.* We were thus compelled to press on in *CFA* to ensure that no other aspect of the organization's activities could serve as a jurisdictional predicate.

Drawing on *Community Blood Bank* and our review of federal tax law, we concluded that Section 4 imposes a two-pronged test that looks to both the source and destination of an organization's income. "The not-for-profit jurisdictional exemption under Section 4," we held, "requires both that there be an adequate nexus between an organization's activities and its alleged public purposes and that its net proceeds be properly devoted to recognized public, rather than private, interests."*Id.* at 23,357. Because CFA's activities bore a sufficient nexus to its charitable purposes and because its income was distributed entirely to members who were not for-profit entities, we concluded that it met both prongs and, accordingly, was exempt from our jurisdiction.

As is plain from the opinion, an organization that falls short on either prong comes within our jurisdiction. Therefore, rather than undermine our decision in *AMA, CFA* simply adds an additional step of analysis when an organization satisfies the prong enunciated in *AMA.*

CDA falls within our jurisdiction for the same reasons the AMA did, and, as a result, we need not examine the nature of its activities in addition to the substantial pecuniary benefits it generates for its members. CDA, like the AMA, is organized as a nonprofit corporation under state law and is exempt from federal income taxes under Internal Revenue Code § 501(c)(6), 26 U.S.C. § 501(c)(6) (1995), which applies to "business leagues, chambers of commerce, real estate boards and boards of trade" consisting of members that

share common business interests. See 26 C.F.R. § 1.501(c)(6)-1 (1995). It thus apparently does not qualify for exemption under I.R.C. § 501(c)(3), 26 U.S.C. § 501(c)(3), which exempts organizations that are "organized and operated exclusively for [eleemosynary purposes] . . . no part of the net earnings of which inures to the benefit of any private . . . individual." This status is pertinent to our jurisdictional analysis, but in applying the AMA test, we nonetheless review for ourselves whether CDA confers pecuniary benefits upon its members as a substantial part of its activities. See 94 F.T.C. at 990 n.17.[4]

In deciding that the AMA's activities engendered pecuniary benefits to its members, the Commission pointed to founding documents and promotional literature indicating that one of the AMA's goals was to serve the "material interests" of the medical profession and provide "tangible benefits and services to its members," such as insurance programs, a retirement plan, a physician placement service, publications, authoritative legal information, and practice management programs. See 94 F.T.C. at 986-87 (citations omitted). The Commission also cited the AMA's legislative and lobbying efforts on behalf of physicians as an important tangible benefit provided by the organization to its members. *Id.* at 987; see also *Michigan State Medical Society,* 101 F.T.C. at 283-84.

CDA offers many similar benefits and bills itself as an organization that "represent[s] dentists in all matters that affect the profession," CX 1546-A; IDF 63, and that "offers far more services to its members than any other state [dental] association," CX 1544; IDF 67. For instance, CDA engages in lobbying activities that have been repeatedly described by CDA's president as saving members significant amounts of

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[4] We find no reason at this time to adopt, as complaint counsel urges, a rebuttable presumption "that any trade or professional association with a 501(c)(6) tax classification . . . operate[s] in substantial part for the economic benefit of its members, and therefore [is] subject to Commission jurisdiction." Brief for Complaint Counsel at 17-18.

money, IDF 72, 74, provides practice management seminars, IDF 92, marketing and public relations services, IDF 86-88, and, through for-profit subsidiaries, offers its members professional liability insurance, business and personal insurance, and financial services, IDF 109-18. Indeed, the last time CDA made a comprehensive accounting of the allocation of its resources, only 7 percent was spent on "[s]ervices to the [p]ublic," while 65 percent funded "[d]irect [m]ember [s]ervices," 20 percent was used for "[a]ssociation [a]dministration & [i]ndirect [m]ember [s]ervices," and 8 percent went to defray the costs of "[m]embership [m]aintenance."CX 1448-C; IDF 69. In sum, without questioning whether CDA engages in activities that benefit the public, we agree with the ALJ that the services CDA provides to its members satisfy the jurisdictional threshold of the Act. See ID at 69-71.

IV. CONSPIRACY

CDA next challenges the legal and factual basis of the ALJ's finding that it conspired or combined with its members and component societies to restrict unreasonably the dissemination of information and thereby restrain competition. First, CDA argues that it is legally incapable of conspiring with its members or its component societies, because they form a single economic unit much like a corporation and its wholly owned subsidiary, which generally cannot conspire with one another. Brief for Respondent 68 - 69 (citing *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984)). Second, it maintains that there exists no requisite, conspiratorial unity of purpose among the component societies or between CDA and its components to restrict advertising or restrain competition, and that each component has instead prohibited what it independently perceived to be false and misleading advertising. *Id.* at 47-53. We disagree with both assertions.

Section 1 of the Sherman Act does not reach the unilateral acts of a single firm, but only restraints of trade achieved by "'contract, combination . . . or conspiracy' between *separate*

entities."*Copperweld*, 467 U.S. at 768 (emphasis in original)[5] In *Copperweld*, the Court considered whether a parent company and its wholly owned subsidiary could provide the requisite plurality of actors under Section 1, and it held that they could not:

> "A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny." *Id.* at 771.

In other words, where a group of persons or corporations do not pursue independent economic motives, they are viewed as a single economic entity, akin to a firm and its executives, and are thus deemed incapable of entering into a conspiracy within the meaning of Section 1. This principle is inapposite here, however.

Unlike firms that are acquired by a parent corporation, dentists do not shed their economic identities as competitors in the dental services market upon joining the association. Thus, in contrast to the strategies of a single firm, or a parent and its wholly owned subsidiary, CDA's policies and decisions regarding the market activities of its member dentists embody a continuing agreement among competitors.

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[5] Although the FTC has no independent authority to enforce the Sherman Act, its authority under Section 5 of the FTC Act extends to conduct that violates the Sherman Act. See, *e.g.*, *F.T.C. v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953); *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457, 463-64 (1941). While the reach of Section 5 is broader than that of the Sherman Act, we need not lay out the precise scope of Section 5 in this case because, as we indicate below, see *infra* Section V, the instant practice makes out a violation of Section 1 of the Sherman Act, 15 U. S . C. § 1. *Cf. F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 454-55 (1986).

Indeed, were we to conclude otherwise, a cartel would evade liability under Section 1 simply by organizing itself as a trade association.

Quite properly, then, professional associations are "routinely treated as continuing conspiracies of their members," as Professor Areeda has pointed out. VII Phillip E. Areeda, Antitrust Law ¶ 1477, p.343 (1986); see *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (citing same). For example, in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), the Court declared a professional association's ethics rule prohibiting competitive bidding by its members to be in violation of Section 1, noting in passing that "[i]n this case we are presented with an agreement among competitors." Similarly, in *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 455 (1986), the Supreme Court found that there was "no serious dispute" that members of the respondent organization had "conspired among themselves" by promulgating a policy restricting the information its members would provide insurance companies. And in one of its more explicit statements on the subject, the Court in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 99 (1984) *("NCAA")*, expressly rejected a single entity defense when it examined a rule promulgated by an association composed of institutions who were otherwise competitors in the market for "television revenues, . . . fans and athletes," noting that "[b]y participating in an association which prevents member institutions from competing against each other . . . member institutions have created a horizontal restraint." As we said in *Michigan State Medical Society*, 101 F.T.C. at 286 (citations omitted), "[t]here is ample precedent for finding that individual professionals, acting through their organizations, can conspire or combine to violate the antitrust laws."

We also reject CDA's factual contention that complaint counsel has failed to prove that the alleged conspirators shared "'a unity of purpose or a common design and

understanding, or a meeting of minds in an unlawful arrangement.'" Brief for Respondent at 48 (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). See also *Monsanto Co. v. Spray-Rite Serv. Corp*, 465 U.S. 752, 764 (1984). CDA clearly promulgated the Code of Ethics, which, as noted in AMA, by itself "implies agreement among the members of [the] organization to adhere to the norms of conduct set forth in the code." *AMA*, 94 F.T.C. at 998 n.33. As part of their application to CDA, members expressly pledge to abide by the Code of Ethics as interpreted by the association's authorized officers. See CX 1258-E. And the Judicial Council (together with its Membership Application Review Subcommittee) interprets and enforces the Code of Ethics. IDF 14, 157. Therefore, despite CDA's attempt to portray the resulting restrictions as the product of independent, and often inconsistent, activities on the part of CDA and each component society, there is ample evidence in the record that the restrictions at the heart of this case were promulgated and enforced directly by, or at the direction of, CDA itself.

CDA's Code of Ethics and accompanying Advertising Guidelines require that all price advertising be exact and that discount advertising list the regular fee for each discounted service, the percentage of the discount, the length of time that the discount will be available, verifiable fees, and the specific groups who are eligible for the discount as well as any other limitation. CX 1484-Z-49 to 50; CX 1262-I. In enforcing these provisions, CDA has routinely cited members for using phrases such as "low," "reasonable," or "inexpensive" fees, see, *e.g.*, CX 301-B & -D; CX 118 B, and for failing to include the regular fees for each service covered by across-the-board senior citizen discounts, or coupon discounts for new customers, see, *e.g.*, CX 843-B, CX 585-A. See generally IDF 168-82.

CDA restricts nonprice advertising as well. See generally IDF 183-216, 294-317. CDA forbids "[a]dvertising claims as to the quality of services," CX 1484-Z-50, which include claims such as "quality dentistry," see, *e.g.*, CX 1083-A;

CX 387-C, prohibits dentists from advertising that their services are superior to those of their competitors, see, *e.g.*, CX 671-A; CX 43-B; CX 1026-A, bans the advertising of guarantees, see, *e.g.*, CX 668-C; CX 557-C; CX 497-C, and has, on occasion, imposed burdens on dentists who have advertised their efforts to alleviate patient anxiety, see CX 70-A. Finally, CDA prohibits dentists from including information about their practice on forms distributed in connection with public or private school screenings. See, *e.g.*, CX 1115-A; CX 1167-A.[6]

[6] Although the Initial Decision, IDF 168-216, 294-317, relies on statements and enforcement activities by both CDA and its local component societies, our independent review of the record reveals that CDA was specifically involved in numerous enforcement actions so as to make the challenged restraints its own, rather than only unrelated incidents of restrictions by local components. We do not address CDA's specific concerns regarding the ALJ's reliance on complaint counsel's summary document CX 1659, since our own review of the record does not rely on the challenged document.

Since 1990 alone, there have been scores of cases in which CDA actively participated in the enforcement of the various restrictions identified in the text. To name a few examples, in recent years CDA was consulted, issued an opinion, or required that action be taken with regard to the advertising of Dr. Hansa Asher (senior citizen discount, CX 18 A, CX 18 B (1993)), Dr. Walter Rosenkranz (new customer special, CX 865 E, CX 865 C (1993)), Dr. Noel Dorotheo (senior citizen discount, CX 333 F, CX 333 A (1993)), Dr. Joseph Foroosh (representations of superiority, CX 360 A (1986); discounts, CX 366 A (1993); state of the art dentistry, CX 66 A (1993)), Dr. John Baron (superiority claim, CX 43 B (1993)), Dr. Coulter Crowley (new patient discount, CX 248 B (1993)), Dr. Richard Casteen (senior citizen discount, CX 151 B (1993)), Dr. Henry Lerian (affordable costs, superiority claims, CX 605 A (1993)), Drs. Angelique and Katherine Skoulas (infection control standards, CX 963 A (1993)), Dr. Kumar Ramalingam (discount, CX 843 A (1993)), Dr. Russell Coser (pleasant dentistry, CX 232 (1993)), Dr. Gerald Brown (experience, CX 115 A (1993)), Dr. Darral Hiatt (discount, CX 444 A (1993)), Dr. Mark Rocha (discount, CX 855 A, CX 856 (1993)), Dr. Cheryl Johnston (experience, guarantees and discounts, CX 497 A-D (1993)), Dr. Brent Maiden (senior citizen discount, CX 646 C (1992)), Dr. Corey Nicholl (discounts, CX 775 A (1993)), Dr. Steven Williams (superiority and quality of care, CX 1083 A (1992)), Dr. Edward Norzagaray (superiority and senior discount, CX 780 A, CX 780

B (1992)), Dr. Roxanne Schleuniger (seniors discounts, CX 913 A (1992)), Dr. Eugene Kita (discounts for cash patients, guarantees, CX 557 B, CX 557 C (1992)), Dr. Gregory Skinner (senior citizen discount, affordable dentistry, and caring dentistry, CX 957 B, CX 957 C, CX 957 D-E (1992)), Dr. Phillip Jenkins (gentle, comfortable and affordable dentistry, CX 478 A (1992)), Dr. Howard Moy (discounts and affordable prices, CX 755 A, CX 755 B (1992)), Dr. Parto Ghadimi (discount for all new patients, sterilized environment, quality of care, CX 387 A, CX 387 C (1992)), Dr. Donald Reid (superiority, CX 848 C (1991)), Mickiewicz & Rye Dental Group (claim of superiority, CX 718 B (1992)), Dr. James Tracy (superiority claim, CX 1026 A (1992)), Drs. Grant and Randall Stucki (senior discount, guarantee, CX 1000 C (1992)), Dr. Christopher Go (superiority claim, CX 394 B (1993)), Dr. Leslie Latner (discount, experience, superiority, CX 583 (1991)), Dr. Farida Butt (discounts, experience, CX 126 A (1991)), Dr. Pargev Davtian (senior citizen discounts, CX 297 B (1991)), Dr. Nazameddin Beheshti (senior citizens discount, CX 49 A (1990); discounts, CX 51 A (1991)), Dr. Jack Dubin (affordable dentistry, CX 335 A (1991)), Dr. Gerald VanderAhe (endorsement and low prices, CX 1042 A, CX 1042 B (1991)), Dr. Thomas Bales (affordable financing, CX 32 A (1991)), Dr. Sean Moran (offer of discount, CX 745 D, E (1991)), Dr. Paige Jeffs (discount, special offer, CX 474 A-B (1990)), Dr. Michael Leizerovitz (quality for less, offers of discounts, special offer for x-rays, CX 602 A, CX 602 C, CX 602 D (1991)), Drs. William Kachele & Andrew Stygar (affordable dentistry, discounts, CX 514 A, CX 516 A, CX 516 C (1991)), Dr. Jack Rosenson (affordable dentistry, fair fees, representations of superiority, CX 866 A, CX 866 C (1991)), Dr. Indravadan Patel (discount, CX 828 D (1990)), Dr. Tarsem Singhal (affordable prices, CX 949 C (1990)), Dr. Daniel Tucker (reasonable fees, CX 1032 A (1990)), Dr. Greg Mardirossian (seniors discount, discount, CX 661 A (1990)), Dr. Mark A. Aguilera (expertise claims, discount, CX 4 A, B, C, (1990)), Dr. Leland Jung (affordable prices, CX 501 B (1990)), and Dr. Joseph Paulsen (low fees, CX 830, CX 830 G (1990)). See generally Complaint Counsel's Proposed Findings of Fact, Volume III, Proposed Findings 580-949, and exhibits cited therein.

A cross-section of CDA's involvement is provided by its actions with respect to the advertising of Dr. Kent Buckwalter (reasonable fees, and major savings, CX 118 B (1993)), Dr. Soodabeh Azarmi (coupon discount, CX 27 F (1993)), Dr. Dexter Massa (discounts and guarantee, CX 668 B, CX 668 C (1992)), Dr. Tony Daher (discount, CX 258 C (1993)), Dr. Christine Choi (percentage discount for new patients, CX 206 A (1992)), Valley Presbyterian Hospital (superiority, CX 354 (1992)), Dr. Trang Nguyen (discount, affordable price, CX 772 A, CX 772 C (1992)), and Dr. Eric Debbane (quality, low cost, CX 306 A, CX 306 C (1990)). *Id.* Beyond these numerous incidents, which establish

We conclude that the policies adopted and enforced by CDA evidence a horizontal restraint among its members, and therefore constitute an agreement among competitors. We turn, then, to the legality of this agreement.

V. Legality Of Restraints On Trade

Before we examine the specific restrictions on various types of advertising imposed by CDA, it will be useful to say a few words about the role of advertising in a competitive system. Truthful and nondeceptive advertising serves the important function of informing the consumer about "who is producing and selling what product, for what reason, and at what price." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) See generally, *AMA*, 94 F.T.C. at 1005. By apprising consumers of the "availability, nature, and prices of products and services," such advertising "performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

We believe in the basic premise, as does the Supreme Court, that by providing information advertising serves predominantly to foster and sustain competition, facilitating consumers' efforts to identify the product or provider of their choice and lowering entry barriers for new competitors. See generally, R. McAuliffe, Advertising, Competition, and Public Policy (1987); P. Nelson, Advertising as Information,

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CDA's involvement in the conspiracy to restrict members' advertising, there are hundreds of related enforcement actions by the local component societies, which exacerbates the impact of the restraints on competition. *See id.*

Contrary to the charge made in Commissioner Azcuenaga's dissent, then, our decision in this case does not rest on "a handful" of questionable actions, see, *e.g.*, *post*, at 12, but on ample evidence of pervasive CDA enforcement. CDA stood knee deep in actions restraining the advertising of its members, and the examples noted here and in the text are intended to serve only as illustrations of that practice.

82 Journal of Pol. Econ. 729 (1974); J. Langenfeld and J. Morris, Analyzing Agreements among Competitors, 1991 Antitrust Bulletin 651, 667 and n.21; C. Cox and S. Foster, The Costs and Benefits of Occupational Regulation 29-36 (Bureau of Economics: Federal Trade Commission 1990).

Restrictions on truthful and nondeceptive price advertising, on the other hand, "increase the difficulty of discovering the lowest cost seller of acceptable ability[,] . . . [reduce] the incentive to price competitively," and "serv[e] to perpetuate the market position of established [market participants]." *Bates*, 433 U.S. at 377-78. See also *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (quoting *Bates*, 433 U.S. at 377). As a result, "where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising." *Bates*, 433 U.S. at 377. The importance of advertising, however, attaches not only to price information, but to all material aspects of the transaction. As the Court has indicated, "all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Professional Engineers*, 435 U.S. at 695.

Restrictions on broad categories of truthful and nondeceptive advertising, therefore, do place restraints on trade, and our cases have recognized as much. For example, we held in *AMA* that "[g]iven the integral function of advertising and other forms of solicitation to the workings of competition in our society" the AMA's complete ban on advertising or solicitation "has, by its very essence, significant adverse effects on competition among [its] members," and that "the nature or character of these restrictions is sufficient alone to establish their anticompetitive quality." 94 F.T.C. at 1005. Subsequently, in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549, 605 (1988), we found that "[r]estraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects." Further, we determined that the services at issue in that case were

cheaper in states that permitted certain advertising than in states that did not. *Id.* at 606 (citation omitted); see also *id.* at 563 (Initial Decision). And we have entered into a number of consent agreements with associations on the theory that consumers are harmed by restrictions on advertising of the price, quality, or convenience of professional services. See, *e.g., Association of Independent Dentists,* 100 F.T.C. 518 (1982); *Oklahoma Optometric Ass'n,* 106 F.T.C. 556 (1985); *American Inst. of Certified Public Accountants,* 113 F.T.C. 698 (1990). Since it is apparent from the record that advertising is important to consumers of dental services and plays a significant role in the market for dental services, IDF 265-67, 321, the general proposition regarding the importance of advertising to competition carries over to the instant situation.

Restraints on trade have been held unlawful under Section 1 of the Sherman Act either when they fall within the class of restraints that have been held to be unreasonable *per se,* or when they are found to be unreasonable after a case-specific application of the rule of reason. Other "restraints" have been upheld because they enhance competition or create no significant anticompetitive effect. In each situation, however, the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition. See *NCAA,* 468 U.S. at 104; *Professional Engineers,* 435 U.S. at 691.

Under the rule of reason, a challenged practice is examined in light of all the facts relevant to the particular case at hand. A court will examine the restraint in the totality of the material circumstances in which it is presented in order to assess whether it impairs competition unreasonably. Although many courts have elaborated on the details of this test, Justice Brandeis's classic formulation remains the touchstone for this rule-of-reason analysis:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition. To determine that

> question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectional regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918).

This enquiry need not be conducted in great depth and elaborate detail in every case, for sometimes a court may be able to determine the anticompetitive character of a restraint easily and quickly by what has come to be known as a "quick look" review. See *Indiana Federation of Dentists,* 476 U.S. at 459-61; *NCAA,* 468 U.S. at 106-10, 109 n.39.

A *per se* category of violation may emerge as courts gain familiarity with the almost invariably untoward effects of a particular practice across economic actors and circumstances. As the Court said in *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 344 (1982), "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Per se* categories of unlawful economic activities, in other words, consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial redeeming virtues. The general conclusion that they are illegal without further analysis of the particular circumstances under which they arise in a given case is thereby justified. See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,* 472 U.S. 284, 289-90 (1985). Examples of such practices are horizontal price fixing, see *United States v. Socony-Vacuum Oil Co., Inc.,* 310 U.S. 150 (1940); *F.T.C. v. Superior*

Court Trial Lawyers Ass'n, 493 U.S. 411 (1990), territorial divisions among competitors, *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and certain group boycotts, see, *e.g.*, *Northwest Wholesale Stationers, supra.* See also *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958).

When an activity falls into a *per se* category, the individual agreement or practice at issue is thought beyond justification in the sense that any argument as to the harmlessness of the restraint, or any proffer of procompetitive justifications for the practice, will generally not be considered. For example, the "reasonableness" of a fixed price will not excuse the attendant interference with the free flow of competition. *United States v. Addyston Pipe & Steel*, 85 F. 271, 291 (6th Cir. 1898) (dictum), *aff'd as modified* 175 U.S. 211 (1899); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). See also *Superior Court Trial Lawyers*, 493 U.S. at 421 ("We may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants.") Nor will a court listen to the argument that the parties lacked the necessary market power to render the agreement effectual. *Superior Court Trial Lawyers*, 493 U.S. at 430-31; *Socony-Vacuum*, 310 U.S. at 224 n.59. The *per se* approach, therefore, condemns certain agreements even in those rare instances in which they may have proved reasonable or harmless under an extended, individualized rule-of-reason analysis, but this occasional injustice is outweighed by the rule's promotion of administrative and judicial economy and its creation of clear guidelines for market actors. *Maricopa*, 457 U.S. at 344 & n.16, 351 (citation omitted).

It is true that there is a converging of the *per se* category (including possible adjustments under the decision in *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979)) and a full blown rule of reason (which can take place expeditiously under a "quick look" approach) so that at times the two antitrust approaches do not differ significantly. Phillip E.

Areeda, VII Antitrust Law ¶ 1508, p. 408 (1986). Although there have been some oblique suggestions in Supreme Court cases that perhaps the categories had merged, the Court later returned to distinguishing between *per se* and rule of reason categories. See, *e.g.*, *F.T.C. v. Superior Court Trial Lawyers, supra; Palmer v. B.R.G. of Georgia*, 498 U.S. 46 (1990) (per curiam).[7] We believe these separate categories continue to serve valid enforcement purposes and, in any event, authoritative Supreme Court decisions continue to recognize the distinction. We therefore turn to a discussion of the particular restraints imposed by CDA and consider the proper antitrust treatment that is to be accorded to each.

A. *Per Se Illegality - Restraints on Price Advertising*

Although it is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws, see *e.g.*, *Maricopa*, 457 U.S. at 344-48; *Trenton Potteries*, 273 U.S. at 397, the price-related restrictions in this case differ from the classic price fixing conspiracy in that the agreement between CDA and its members burdens only members' advertising, as opposed to prohibiting specific sales transactions. That, however, does not save the restrictions from *per se* condemnation. CDA's restrictions on advertising "low" or "reasonable" fees, and its extensive disclosure requirement for discount advertising, effectively preclude its members from making low fee or across-the-board discount claims regardless of their truthfulness. Such a ban on significant forms of price competition is illegal *per se* regardless of the manner in

[7] Commissioner Starek notes in his concurrence that *Massachusetts Board of Optometry* "set out a 'structure for evaluating horizontal restraints' that is both consistent with the Supreme Court's teaching and, as the Commission observed in that case, 'more useful than the traditional use of the *per se* or rule of reason labels.'" *Post*, at 2-3 (quoting *Massachusetts Board of Optometry*, 110 F.T.C. at 603-604). Useful or not, however, we believe that it is for the Supreme Court to say whether its traditional analysis is to be abandoned. As recent cases indicate, the Court has not done so.

which it is achieved. See, *e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

1. Effective Prohibition of Advertising

Section 10 of CDA's Code of Ethics prohibits advertising that is "false or misleading in any material respect," which, in turn, is defined to include any statement that is "likely to mislead because in context it makes only a partial disclosure of relevant facts" or "[r]elates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors." CDA Code of Ethics, § 10, Adv. Ops. 2(b) and (d); CX 1484-Z-49. Further Advisory Opinions provide:

> "3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import.
>
> "4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity -- for example, 'low fees' -- must be based on verifiable data substantiating the comparison or statement of relativity." *Id.*, Adv. Ops. 3 and 4; CX-1484-Z-49 to Z-50.

CDA has also separately issued detailed Advertising Guidelines, which purport to permit the advertising of "[d]iscounts on regular fees," CX 1262-D, but explain that any advertisement for discounted dental services must "list *all* of the following":

(1) "[t]he dollar amount of the nondiscounted fee,"
(2) "[e]ither the dollar amount of the discount fee or the percentage of the discount for the specific service,"
(3) "[t]he length of time, if any, that the discount will be offered,"

(4) "[v]erifiable fees", and
(5) "[s]pecific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." CX-1262-I (emphasis in original).

Although this may sound like an innocuous regulation that does no more than enhance the truthfulness of the information conveyed, in its enforcement CDA effectively precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts.

The silencing effect of CDA's enforcement of the restrictions on advertising of low fees is evident from the record. For example, respondent recommended denial of membership to one dentist because he advertised, among other things, references to "cost that is reasonable," "affordable, quality dental care," "making teeth cleaning . . . inexpensive," and "very reasonable rates," which were objectionable because "fee advertising must be exact." See CX 301-B to D. Although CDA ostensibly changed course in 1991 (based on a rediscovered decision of the Judicial Council in 1978 which had approved use of the phrase "reasonable fees"), this alleged retraction does not appear to have been communicated to CDA's components nor did it terminate CDA's practice of citing members for use of that term. See IDF 255-57; CX 391; CX 778. Thus, on November 4, 1993, CDA recommended denial of membership to a dentist because, among other things, his employer's advertising included the offers "reasonable fees quoted in advance" and "major savings," and in respondent's view "the above referenced phrases are misleading and would cause an ordinarily prudent person to misunderstand or be deceived." CX 118-B. As occurred frequently in CDA's enforcement actions, the citation gives no indication that the conclusion regarding the misleading nature of the phrases was based upon an allegation that the advertising claim was false or that the advertising dentist lacked a

reasonable basis for the fee representations made. See also T. 361-78 (Dr. Miley).[8]

CDA's discount disclosure standards turns out to have been equally prohibitive. The Supreme Court's warning that "'[r]equiring too much information in advertisements can have the paradoxical effect of stifling the information that consumers receive,'" *Morales,* 504 U.S. at 388 (quoting letter from FTC to Christopher Ames, Deputy Attorney General of California, dated Mar. 11, 1988), applies in this case. As even a member of CDA's Judicial Council, Dr. Kinney, acknowledged at trial, across-the-board discount advertising in literal compliance with the requirements "would probably take two pages in the telephone book" and "[n]obody is going to really advertise in that fashion." T. 1372. Although dentists can comply with the disclosure requirement when advertising a discount for a small number of services, the record bears out the conclusion that dentists do not advertise across-the-board discounts that include a complete itemization of the regular fee for each discounted service. See, *e.g.,* Appendix to Brief for Respondent; IDF 179. Dr. Kinney purported to agree that "if they are offering a discount to senior citizens and this is an across the board discount for everything . . . you would have to be a little flexible and . . . not . . . require that . . . every single fee [be listed]," T. 1373, but CDA did not ever compromise its demand for full compliance with the panoply of disclosures. For example, it recommended denial of membership to one dentist because she advertised, among other things, "20% off new patients with this ad" without including the dollar amount of the nondiscounted fee for each service. See CX 206-A; T. 1063-65. Another was advised that his advertisement of "25% discount for new patients on exam x-ray & cleaning/ 1 coupon per patient/ offer expires 1-30-94/ not good with any other offer" was unacceptable

[8] See FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 648, 839 (1984) (appended to *Thompson Medical Co., Inc.)* (advertisers must have "a reasonable basis for advertising claims before they are disseminated"). Cf. *Infra* note 25.

since it did not include the customary fee. CX 843-44. A third was admonished for having offered a "10% senior citizen discount" without the disclosures required by respondent. See CX 585-A, 586-E, 588-B.

Thus, regardless of the formal codification of its policy, CDA in fact imposed a broad ban on these forms of price advertising by its members.

2. *Per Se* Illegality

This effective prohibition on truthful and nondeceptive advertising of low fees and across-the-board discounts constitutes a naked attempt to eliminate price competition and must be judged unlawful *per se.* That it does so by the indirect means of suppressing advertising does not change that result. Nor is it of consequence that we are faced with a restriction among professionals.

Conspiracies to eliminate price competition come in various forms. For example, in *Socony-Vacuum, supra,* the Supreme Court struck down as *per se* unlawful an agreement among competing oil companies to purchase large amounts of gasoline on the spot market and store it for later sale in an effort to stabilize prices. In *United States v. General Motors Corp.,* 384 U.S. 127, 145-47 (1966), the Court examined concerted activity aimed at preventing discounters from doing business with car dealers and found this practice also to be a *per se* violation of the Sherman Act. And *Catalano,* 446 U.S. 643, held that an agreement among wholesalers to eliminate short-term credit formerly granted to retailers made out a *per se* violation as well. More recently, in *Denny's Marina, Inc. v. Renfro Productions, Inc.,* 8 F.3d 1217 (7th Cir. 1993), the Seventh Circuit held an association of marine dealers to have engaged in a *per se* violation of the Act when it refused to admit a dealer to its annual boat show because of that dealer's publicized policy to "meet or beat" competitors' prices at the shows. And in *Blackburn v. Sweeney,* 53 F.3d 825 (7th Cir. 1995), another case invoking *per se* analysis, the Seventh Circuit held that an agreement

among competitors not to advertise in specified territories was tantamount to an outright allocation of markets and thus illegal *per se*. "To fit under the *per se* rule," the court reasoned, "an agreement need not foreclose all possible avenues of competition." *Id.* at 827. The restrictions on advertising sufficed to bring the agreement under the rule.

Indeed, in *AMA*, we had already noted that "restraints on the advertising of prices have previously been considered *per se* illegal by some courts." 94 F.T.C. at 1003 (citing *United States v. Gasoline Retailers Ass'n, Inc.*, 285 F.2d 688 (7th Cir. 1961), and *United States v. House of Seagram, Inc.*, 1965 Trade Cas. (CCH) ¶ 71,517 (S.D. Fla. 1965)). In the cited Seventh Circuit decision, the court had reviewed a horizontal agreement among gasoline retailers to refrain from advertising or giving premiums, and from advertising the price of their product in locations other than the gasoline pumps, and the court declared this conspiracy to be a *per se* violation of the Sherman Act. 285 F.2d at 691. Although the agreement was thus coupled with outright price maintenance, the conspiracy in restraint of advertising was no less singled out for *per se* condemnation. *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960), is also instructive. In that case, the Court held that Parke Davis had gone beyond the limits of permissible vertical arrangements by enlisting wholesalers in a conspiracy to deny its products to retailers who sold below the suggested minimum retail price. This conspiracy, which had a distinctive horizontal flavor, was illegal under the Sherman Act. *Id.* at 45-46. Important for our purposes is that the Court went on to address how Parke Davis had similarly brokered a horizontal agreement among retailers to suspend advertising of discounts, concluding that these actions were directed at creating a *per se* unlawful agreement to eliminate price competition. *Id.* at 46-47. Applying *Parke Davis*, the District Court in *Seagram* expressly held that horizontal "[a]greements by retailers . . . to discontinue advertising . . . are tantamount to agreements not to compete and constitute *per se* violations . . . of Section 1 of the Sherman Act." 1965 Trade Cas. (CCH) ¶ 71,517 at p. 81,275. Finally, the Seventh Circuit confirmed the view

that a prohibition on advertising discounts "is functionally a price restriction," *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 724 (7th Cir. 1986), and refrained from applying the *per se* rule only because, as the court noted in a subsequent appeal in that case, "the *per se* rule against this practice does not apply when the vendor is an agent," 889 F.2d 751, 752 (1989), *cert. denied*, 495 U.S. 919 (1990).[9]

Horizontal agreements suppressing broad categories of truthful and nondeceptive price advertising, then, effectively suspend a significant form of price competition. Indeed, such an agreement to eliminate price advertising can be more threatening to competition than a ban on discount sales, since, as Judge Easterbrook noted in *Illinois Corporate Travel*, a "no-advertising rule . . . is easily enforceable because advertising of discounts is observable." 806 F.2d at 727.

The professional context of this restraint does not lead to a different conclusion. In *AMA*, we ultimately refrained from classifying the price advertising restraints as *per se* illegal largely due to our hesitation to speak categorically about restrictions by professional associations, which at the time had "not previously been subject to extensive scrutiny under the antitrust laws." 94 F.T.C. at 1003. See also *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) ("We do not know enough of the economic and business stuff out of which these arrangements emerge to . . . decide whether they . . . should be classified as *per se* violations."); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n.17 (1975) ("It

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[9] In a case in which automobile dealers conspired to oppose invoice advertising (which is advertising the price as a fixed percentage or sum above the dealer's invoice), the Justice Department recently reached the conclusion that "an agreement by a trade association or its members not to engage in certain types of advertising is a *per se* violation of the antitrust laws." Competitive Impact Statement regarding proposed Final Judgment in *United States v. National Automobile Dealers Ass'n*, Civ. Action No. 95-1804 (D.D.C. filed Sep. 20, 1995) at 6, reprinted in 60 Fed. Reg. 51,491, 51,498 (Oct. 2, 1995).

would be unrealistic to view the practice of professions as interchangeable with other business activities."). The Supreme Court had just decided *Professional Engineers* under a truncated analysis, but without expressly declaring that it was subjecting the association's prohibition against competitive bidding to *per se* treatment. Since then, however, it has become clear that the Court in that case did essentially apply a *per se* rule to the agreement. See *Catalano*, 446 U.S. 643; *In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457, 471 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 461 (1992); *Michigan State Medical Society*, 101 F.T.C. at 290.[10] And both the Commission and the courts have in

[10]Although in *Professional Engineers* the Supreme Court did not expressly identify the approach it used as *per se*, this now appears to have been merely a matter of terminology, rather than analytical significance. The Court's opinion in *Professional Engineers* placed both the abbreviated, categorical approach as well as the individualized, contextual examination under the umbrella label "rule of reason." See 435 U.S. at 691-692. It explained that the first applies to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal *per se*,'" whereas the second encompasses "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *Id.* at 692. It then termed the ban on competitive bidding "illegal on its face," noting that "[w]hile this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* Finally, it noted: "Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But the Society's argument in this case is a far cry from such a position." *Id.* at 696.

Since that case, the Court has returned to applying the label "rule of reason" to the second approach only, as a means to distinguish it from the *per se* category. Although the Court has at times quoted from *Professional Engineers* as though the case had applied the individualized rule of reason, see, *e.g.*, *Indiana Federation of Dentists*, 476 U.S. at 459, the Court has elsewhere indicated that the approach it used in *Professional Engineers* was indeed what we generally would term *per se*, see *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). We use the term "rule of reason" when speaking about the individualized analysis, in contradistinction to the categorical, *per se* approach.

the interim gained considerable exposure to anticompetitive activities by professional associations.[11]

To be sure, the "'public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.'" *Maricopa*, 457 U.S. at 348-49 (quoting *Goldfarb*, 421 U.S. at 788 n.17). By the same token, however, in cases involving agreements not "premised on public service or ethical norms," the Supreme Court has repeatedly applied the *per se* rule. *Id.* at 349. Cf. *Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983) ("an agreement to fix prices will not escape *per se* treatment simply because it is entered into by professionals and accompanied by ethical protestations [, whereas] . . . a canon of medical ethics purporting, surely not frivolously, to address the importance of scientific method gives rise to questions of sufficient delicacy and novelty at least to escape *per se* treatment"), *cert. denied*, 467 U.S. 1210 (1984). Recently, for example, in *Superior Court Trial Lawyers*, the Court had no trouble deciding that *per se* treatment was called for when lawyers entered into a horizontal agreement to fix prices, the professional context notwithstanding. 493 U.S. 411. Furthermore, our own decision in *Michigan State Medical Society*, which purportedly refrained from applying the *per se* rule, nonetheless noted that the *per se* standard can apply in the

[11]See, *e.g.*, *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Wilk v. American Medical Ass'n*, 895 F.2d 352 (7th Cir. 1990), *cert. denied*, 496 U.S. 927 (1990); *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988); *Michigan State Medical Society*, 101 F.T.C. 191 (1983); *National Ass'n of Social Workers*, 58 Fed. Reg. 17,411 (April 2, 1993) (consent order issued March 3, 1993); *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued Dec. 16, 1992); *American Inst. of Certified Public Accountants*, 113 F.T.C. 698 (1990) (consent); *Oklahoma Optometric Ass'n*, 106 F.T.C. 556 (1985) (consent); *Association of Independent Dentists*, 100 F.T.C. 518 (1982) (consent).

professional setting even where the conspiracy does not set specific prices or fees. 101 F.T.C. at 290. And in *Massachusetts Board of Optometry* we found that even in the context of professional rules, restraints on truthful advertising "are inherently likely to produce anticompetitive effects," and that a ban on discount advertising for professional services impedes new entry and the efficient use of resources by eliminating a form of price competition. 110 F.T.C. at 605. In that case we summarily condemned the price advertising restraints. *Id.* at 607.[12] We therefore believe it to be well grounded in this experience and in precedent to strip CDA's price advertising restrictions of their professional garb and declare them *per se* unlawful as naked restraints on price competition.

The examination of a practice, however, does not inevitably come to rest after it has been identified as falling into the category of *per se* unlawful bans on price competition. Under *Broadcast Music*, 441 U.S. 1, and *NCAA*, 468 U.S. 85, respondent might attempt to argue that its practice is a restraint on price competition "in only a literal sense." *Maricopa*, 457 U.S. at 355. Arguments that might carry weight under *Broadcast Music's* characterization approach, however, have not been advanced here.[13]

[12]Cf. *Detroit Auto Dealers*, 955 F.2d at 470-71 ("We believe that the inherently suspect conclusion arises from a *per se* approach by the Commission . . .").

[13]We agree with Commissioner Starek that it would be a grave error to chart a course on which "potential competitive benefits of agreements restricting price advertising need never trouble the Commission again." *Post*, at 2. The *per se* rule as articulated in recent cases by the Supreme Court and as applied by the Commission today, however, runs no such risk. To the contrary, we have been open to arguments that might carry weight under *Broadcast Music*, but CDA has simply failed to assert the requisite competitive benefits that might save it from *per se* condemnation. Commissioner Starek certainly is not suggesting that significant, pro-competitive benefits have been overlooked in this case. The view that the Commission's reasoning foreshadows summary condemnation for a vast array of future cases, see, *e. g.*, *post* at 2, 7, therefore, overstates our conclusion here. Only cases involving equivalent conduct will be accorded similar treatment in the future.

Respondent urges only in the most general sense that its restrictions are procompetitive in that they are intended to protect consumers from unfair and deceptive advertising. But respondent has entirely failed to explain why it is unfair or deceptive to advertise an across-the-board discount without disclosure on the face of the advertisement of the regular fee of each service covered by the discount, or how consumers are harmed by an advertisement that announces with a reasonable basis for its truthfulness (let alone truthfully) that the prices charged are low as compared to other providers in the area.

CDA's restraints on price advertising are thus illegal *per se*. In the course of discussing the nonprice advertising restraints under the rule of reason in the next section, however, we will also reexamine the restraints on price advertising under that more elaborate analysis, but solely as a means of demonstrating that, assuming *arguendo* the restraints had escaped censure under the *per se* approach, they would nonetheless have been condemned under the rule of reason.

B. *Rule of Reason -- Restraints on Price & Non-Price Advertising*

Unlike price advertising restraints, which have in one form or another received ample consideration by the courts and fit squarely within the Sherman Act's core prohibition against the collusive suspension of price competition, CDA's restrictions on nonprice advertising are entitled to an examination under the rule of reason. With regard to these restraints, we cannot say with equal confidence that, as a facial matter, CDA's concerns are unrelated to the public service aspect of its profession, or that "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music*, 441 U.S. at 19-20. Thus, mindful of the Court's general reluctance to adopt a *per se* approach in reviewing codes of conduct of professional associations, and heeding the Court's admonition not to expand the *per se* category "until the

judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged," *Maricopa*, 457 U.S. at 349 n.19, we refrain from extending *per se* treatment to the restrictions on nonprice advertising and apply the default, rule-of-reason analysis instead.[14]

The Supreme Court has made clear that the rule of reason contemplates a flexible enquiry, examining a challenged restraint in the detail necessary to understand its competitive effect. See, *e.g.*, *NCAA*, 468 U.S. 103-110. As will be seen, here, application of the rule of reason is simple and short. The anticompetitive effects of CDA's advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion, and, in any event, CDA clearly had sufficient power to inflict competitive harm.

1. The Likely Anticompetitive Effects of the Restraints

Although the ALJ did not examine the effects of CDA's rules in as much detail as he might have, the record demonstrates that each of the restraints, not only those on price advertising, has anticompetitive effects. The nonprice advertising CDA proscribes is vast. In addition to making general prohibitions against false or deceptive advertising, CDA forbids quality claims. Advisory Opinion 8 to Section 10 of CDA's Code of Ethics urges against quality claims:

> "Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading." CX 1484-Z-50.[15]

[14]We do not decide, however, whether, as a general matter, restrictions on nonprice advertising will always escape condemnation under the *per se* rule of illegality.

In practice, CDA prohibits all quality claims. For example, CDA recommended denial of membership to one dentist because her advertising included the phrase "quality dentistry," which CDA maintained was not susceptible of verification, CX 387-C, recommended denial of membership to another because he included in his advertising the phrase "we are dedicated to maintaining the highest quality of endodontic care," which CDA cited as being unverifiable, CX 1083-C, and initially denied membership to yet another dentist because his advertisement of "improved results with the latest techniques" and "latest in cosmetic dentistry," was allegedly likely to create false or unjustified expectations of favorable results as to the quality of service and was not subject to verification, CX-306.

Furthermore, albeit without coextensive written regulations, CDA suppresses claims of superiority and the issuance of guarantees.[16] For example, in 1993, when a dentist reapplied for membership, CDA recommended that he be counseled regarding his advertising because of a representation of superiority, *i.e.*, the claim that "all of our handpieces (drills) are individually autoclaved for each and every patient." See CX 671-A. CDA also routinely cited applicants or members for implying superiority by use of the phrase "state of art," as in one dentist's advertisement of "state-of-art sterilization," CX 43-B. See also, *e.g.*, CX 1026-A ("state of the art dental services"); CX 394-B ("highest standards in sterilization"). In 1992, CDA found an advertisement containing the phrase "we can provide the

[15]Cf. CDA Code of Ethics, § 10, CX 1484-Z-49 (prohibiting advertising that is "false or misleading in any material respect").

[16]CDA does have a provision that may be read to address superiority claims, *i.e.* Section 22 of its Code of Ethics which provides that "[t]he dentist has the further obligation of not holding out as exclusive any agent, method or technique," CX 1484-Z-53. CDA's enforcement record, however, reveals a complete prohibition of superiority claims.

uncompromised standards of excellence you demand" to be an impermissible representation of superiority. CX 354. With respect to guarantees, CDA prohibited such claims as "we guarantee all dental work for 1 year," CX 668-C; CX 557-C, or "crowns and bridges that last," CX 497-C.

CDA has also, on occasion, imposed special burdens on dentists claiming that they offer "gentle" care, CX 70-A, although its activities on that score appear to be less sweeping in recent years than those of CDA's component societies. See IDF 208-15. And finally, CDA passed a resolution in 1984 (to which the organization still adheres today), providing:

> "[I]t is the position of the Judicial Council that solicitation of school children on any private or public school ground(s) is deemed not to elevate the esteem of the dental profession." CX 1115-A.[17]

In the course of enforcing that policy statement, CDA informed a component in 1993 that when dentists participate in school screenings and include their name and address on the screening document sent home to the parents, such activity "can be construed to be a form of [prohibited] solicitation . . . ." CX 1167-A.

In addition to the finding in earlier cases regarding the anticompetitive effects of broad restrictions on the truthful and nondeceptive advertising of a service, see, *supra*, discussion at the beginning of Part V, in this case there is substantial evidence that the restrictions imposed by CDA prevented the dissemination of information important to consumers and the advertising of aspects of a dental practice that form a significant basis of competition among California's dentists. For example, the ALJ found that information not only about price of service, but also about

[17]Cf. CDA Code of Ethics, § 10, CX 1484-Z-49 ("In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public.").

quality and sensitivity to fears is important to consumers and determines, in part, a patient's selection of a particular dentist. IDF 265-67. He also credited the testimony of the owner of an advertising agency that specializes in serving dental practices, who testified that advertising the comfort of services will "absolutely" bring in more patients, and that, conversely, restraints on advertising of the quality or discount of dental services would decrease the number of patients a dentist could attract. IDF 265. In one case, the elimination of the phrase "gentle dentistry in a caring environment" meant sacrificing an advertisement that had attracted 300 new patients within six months. IDF 286. The ALJ also found that the prohibition on distributing identifying information during school screenings resulted in a loss of potential customers. IDF 302.[18]

The importance to consumers of advertising of various characteristics of dental services is confirmed by other witnesses as well. For example, Dr. Richard Harder, who closely monitored the results of his various advertising techniques, testified that generic advertising without comparative quality or price claims was rather ineffective, attracting only 15-20 new patients a month, but that a subsequent campaign based on advertising a special fee for new patients, as well as a dedication to quality of service and family dentistry, brought in between 75 and 100 new patients a month. After being contacted by the local society and threatened with discipline, Dr. Harder eliminated all references to quality and family, which contributed to an observed reduction in the number of new patients coming into his practice. T. 262-74. Dr. John Miley's practice experienced a similar surge in new customers through

[18]The manner in which CDA impairs new entry of competitors is particularly well illustrated by price advertising restraints, such as citations for advertising "Grand Opening Special $5 exam x-ray, $15 polishing and 40% off dental treatment," CX 828-D, "as a get acquainted offer, an initial consultation, complete exam, any x-rays and tooth cleaning will be done for only $5 (applies to all members of your family)," CX 657, and "we guarantee all dental work for 1 year," CX 668-C.

advertising that included references to the quality and superiority of his services, as well as to the fact that he offered discounts and low prices. T. 316-457; CX 723.

As is therefore evident from the record, the restraints hamper dentists in their ability to attract patients to their practice and thereby are likely to reduce output. More important for our purposes, the restrictions thus deprive consumers of information they value and of healthy competition for their patronage. Even without quantifying the increase in price or reduction in output occasioned by these restraints, we find the anticompetitive nature of these restraints to be plain. See *AMA*, 94 F.T.C. at 1006.

2. Market Power

Although the ALJ found that the suppression of advertising "has injured those consumers who rely on advertising to choose dentists," he spelled out a second conclusion, rather in tension with the first, that CDA lacked market power. ID at 76. The ALJ concluded that complaint counsel had failed to establish the relevant product and geographic markets, and decided, on the ground that there was no "insurmountable obstacle to entry" into the dental market, that "CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local." ID at 76. We reject that conclusion.

Market power is part of a rule of reason analysis, but it is important to remember why market power is examined.[19] We consider market power to help inform our understanding of the competitive effect of a restraint. Where the consequences of a restraint are ambiguous, or where substantial efficiencies flow from a restraint, a more detailed examination of market power may be needed. Here, in

[19]The Supreme Court has indicated that when a court finds actual anticompetitive effects, no detailed examination of market power is necessary to judge the practice unlawful. See *NCAA*, 468 U.S. at 109-10; *Indiana Federation of Dentists*, 476 U.S. at 461.

contrast, the ALJ found, and we agree, that the suppression of advertising "has injured those consumers who rely on advertising to choose dentists" (the record indicates that significant numbers of such consumers indeed exist), and none of the practices can rely for support on a valid efficiency justification. To the extent that market power is relevant, it suffices that the association has the power to withhold from consumers the relevant information that they seek.[20] And as we shall explain presently in further detail, CDA has the ability to identify violators of the agreement and the necessary market power to enforce this ban over sufficiently large segments of the market to deprive consumers of valuable information.

When examining the market power of an association's restriction on members who are the primary economic actors, we confront two closely related questions. First, whether viewed as a question of market power or of the existence of an agreement, we must determine whether the association

[20]In *Indiana Federation of Dentists*, 476 U.S. at 459, the Court examined "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire," and concluded:

> "'While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.' *National Society of Professional Engineers, supra*, at 692. A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue -- such as, for example, the creation of efficiencies . . . such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place,' *National Society of Professional Engineers, supra*, at 692, cannot be sustained under the Rule of Reason."

has the ability successfully to impose the restriction on its members. If the association is unable to gain its members' adherence to the rule such that the market continues to function as it had before, the restraint will become an irrelevant formality of little concern to antitrust regulators. If, however, the association is able to induce its current members to follow the rule, and is not reduced significantly by attrition, we must turn to the second question, which asks whether the association has the necessary power to cause harm to consumers by imposing the rule on its members. For if alternative sources for the service offered by the association's members are so prevalent as to permit consumers easily to switch to providers who are unfettered by the rule, even a well-enforced restraint should cause no harm to the efficient functioning of the market. Members will simply lose business, nonmembers' business will surge, and the market will eventually cure itself. If, on the other hand, consumers' abilities to turn elsewhere are limited, the association is in a position to harm consumers by adopting restrictive rules. This turns out to be the case here.

There is little doubt that CDA has the ability to police, and entice its members to adhere to, the restrictions on advertising. Unlike an individual sales transaction, advertising is a public, conspicuous event that is easily monitored. Cf. *Illinois Corporate Travel*, 806 F.2d at 727 (finding no-advertising rule "easily enforceable" because advertising "is observable"). Many components review the Yellow Pages phone listings at the behest of CDA, IDF 146, and CDA investigates complaints about dentists' advertising. There is no evidence in the record of rampant advertising that has failed to come to CDA's attention. Next, it is clear that dentists place a high value on the benefits of membership in CDA, whether because of its insurance and educational programs or the reputational advantage that membership may confer. IDF 268-74; see also, *e.g.*, T. 376-92. We need not quantify this benefit econometrically, since in this case the record speaks for itself. When faced with a choice between membership and advertising, dentists overwhelmingly choose the former. Several component

Ethics Committee officials testified that their members were in perfect or near-perfect compliance with the advertising code and that they knew of not a single instance in which a member dentist had refused to modify or discontinue the challenged advertising. IDF 275-86. Numerous applicants had, of course, already changed their advertising in order to gain admission to CDA in the first place. See, *e.g.*, CX 670-71, CX 365-66, CX 249.[21] Moreover, this stranglehold on the profession extends well beyond actual members to include employers, employees, and business referral services of members, since these are equally prohibited by CDA from engaging in advertising that violates CDA's Code of Ethics (whenever such advertising indirectly benefits the member). IDF 287-93; see CX 1358-B.

Here, this kind of power goes hand in glove with the second, that is the ability successfully to withhold information from consumers. Without much theoretical analysis, it can be readily concluded from the record,

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[21]Quite contrary to Commissioner Azcuenaga's suggestion that "it seems questionable to infer that dentists feared the CDA instead of the state of California," *post*, at 27, the record bears out just that. For example, Dr. Jenkins's capitulation when he "disagree[d] with [CDA's] findings" but decided to "disagree agreeably" and promise that "[t]he statements in question will no longer be used in any mailings from this office," CX 480, evidences that it was this dentist's desire to become a member of CDA, not a concern about state law, that drove him to comply with CDA's Code of Ethics. Similarly, Dr. Foroosh's seven-year battle for admission to CDA, CX 360-366, was clearly motivated by a desire to gain admission to the Association, not to seek continual guidance from CDA about state law. See also CX 302-398 (Dr. Eric Debbane, gaining membership with fourth application). Indeed, two dentists who had apparently cleared their advertisement with the Board of Dental Examiners, nonetheless eliminated all references to "uncompromised standards or outstanding success rates" after they were contacted by respondent and informed that respondent is a separate entity from the Board. CX 355, 357, 358. The record thus contains ample confirmation of the importance of membership and its power to compel the alteration of dentists' advertising practices. See also, *e.g.*, IDF 285 (disagreement with CDA's conclusion but promise to cure advertising); IDF 268-274 (members' statements regarding value of membership).

common sense, and the California Business and Professions Code that the services offered by licensed dentists have few close substitutes and that the market for such services is a local one. See Cal. Bus. & Prof. Code §§ 1625-1626 (defining dental services that can be performed only by licensed dentists); T. 637 & 655 (Christensen) (testifying that dental market is local); see also *Indiana Federation of Dentists*, 476 U.S. at 461 (noting that "markets for dental services tend to be relatively localized"). Even respondent's expert witness agreed that the provision of dental services "could be" a relevant product market, see T. 1689 (Prof. Knox), and his view on the relevant geographic market was that California consists of numerous markets, each "smaller than the [entire] State," since "dental services are bought and sold . . . in a more disaggregated market," T. 1642 (Prof. Knox). CDA commands more than a substantial share of these markets. Around 75 percent of the practicing dentists in California belong to CDA, IDF 2, and, according to one component society, the figure exceeds 90 percent in at least one region, CX 1433. Given CDA's success in enforcing its rules, and the extended reach of its prohibition to various associates of member dentists, we can only assume that even these numbers understate CDA's real market share.

While market share alone might not always be a sufficient indicator of market power, it may nonetheless be relied upon at least where there are significant barriers to entry. For example, in *Michigan State Medical Society*, 101 F.T.C. at 292 n.29, we explained that "there is little need for an elaborate market definition analysis in this case, since MSMS' members account for roughly 80% of the physicians in Michigan." We concluded in that case that, as a result, "no matter how the relevant product or geographic markets might be characterized, the potential impact of the agreements in question is substantial." *Id.* The Seventh Circuit has similarly indicated that reliance on market share can be appropriate, and is "especially so where there are barriers to entry and no substitutes from the consumer's perspective." *Wilk v. American Medical Ass'n*, 895 F.2d 352, 360 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990) (citation

omitted). In addition to the absence of substitutes, however, in the present case there are entry barriers as well.

Barriers to entry figure prominently in California's market for dental services. As an initial matter, we note that it has never been held, as the ALJ appears to believe, that barriers to entry are cognizable in antitrust analysis only when they are "insurmountable," ID at 76, or, as respondent's expert witness thought, only if they are created by the association accused of engaging in anticompetitive practices, IDF 322. And we disagree with respondent's expert witness that costs incurred to enter the market are irrelevant whenever similar costs were borne by current market participants when they first entered the market. See T. 1636-1640.[22]

In our view, the record bears out the conclusion that entry into the California dental market is difficult. In addition to facing the substantial educational requirements, which according to one witness leave students coming out of dental school with between $50,000 and $100,000 of debt, a dentist who seeks to establish a practice must either lease or purchase the necessary space and equipment and hire appropriate personnel, or must purchase an existing practice (the costs of which according to one witness range between $75,000 and $100,000). After setting up the practice, and provided a dentist is able to attract a sufficient clientele, it can take from 18 months to 2 years for a practice to meet current expenses, and between 5 and 10 years to amortize the debt. See IDF 329-31; T. 297-300 (Dr. Harder); T. 329-31 (Dr. Miley); T. 756-64 (Dr. Hamann). Thus, new entry into the dental profession in California is difficult. And given these startup costs, a good deal of which even an active dentist who seeks to relocate to California would face, the idea that fully licensed dentists from other states would move in significant numbers to California to take advantage of the

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[22] A combination of these three beliefs led the ALJ to credit the testimony by respondent's expert witness that CDA's activities had "no impact on competition in any market in the State of California." IDF 322, 326. As indicated in the text, we reject that conclusion.

opportunity to advertise in competition with members of CDA is implausible at best.

Even easy entry at the level of opening a dental practice would not necessarily mean that the Association could not exercise market power. If the Association membership confers a real economic benefit that cannot be easily replicated, then exclusion from the Association may impose a real economic cost on potential entrants. Here, CDA membership entails significant benefits for the dentist as demonstrated by the fact that no one gives up membership in order to gain the freedom to advertise -- including those inclined to advertise but directed not to by CDA.

We therefore conclude that CDA possesses the necessary market power to impose the costs of its anticompetitive restrictions on California consumers of dental services.

3. Efficiencies

As the third step in our quick look, we examine the efficiency justifications proffered by respondent together with any others that might be raised in support of CDA's restraints on advertising. Respondent contends that insofar as its advertising restraints are not harmless, they are procompetitive because CDA challenges only advertising that is false or misleading. Although the prevention of false and misleading advertising is indeed a laudable purpose, the record will not support the claim that CDA's actions are limited to advancing that goal.

Under Section 5 of the FTC Act, an advertisement is deceptive "if it is likely to mislead consumers acting reasonably under the circumstances in a material respect." *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 314 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993) (citation omitted); see also *Southwest Sunsites Inc. v. F.T.C.*, 785 F.2d 1431, 1435-36 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986); *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). A

practice is not considered "unfair" under the Act unless it engenders substantial consumer injury that is not reasonably avoidable by the consumer and not outweighed by countervailing benefits to consumers or competition. See FTC Act Amendments of 1994, § 9, 108 Stat. 1691, 1695, to be codified at 15 U.S.C. § 45; Letter from FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation (Dec. 17, 1980), *reprinted* in Appendix to *International Harvester Co.*, 104 F.T.C. 1070 (1984). Without a significant additional proffer, which CDA has not made, the types of advertising claims categorically prohibited by CDA's stated policies and enforcement efforts could not reasonably be thought to be either deceptive or unfair under Section 5.

First, CDA prohibits even truthful offers of discounts by dentists unless the advertisement states the regular price of the discounted service. Where the discount applies to numerous services (for example, a senior citizens discount on all services), the practical effect of this requirement has been to forbid the advertising entirely. However, the truthful offer of a discount from the price ordinarily charged by a dentist for services is not deceptive. The offer of a discount can, of course, be misleading if the advertiser selectively inflates the price from which the discount is computed or offers "discounts" to everyone from a fictitious "regular" price. See, *e.g.*, *Encyclopedia Britannica, Inc.*, 100 F.T.C. 500, 505 (1982) (order modifying consent order); *Diener's, Inc.*, 81 F.T.C. 945, 976-78, 980-81 (1972), *modified*, 494 F.2d 1132 (D.C. Cir. 1974); *Paul Bruseloff*, 82 F.T.C. 1090, 1095-96 (1973) (consent). But there is no suggestion here that CDA merely prohibited discount claims by dentists found individually to have engaged in such chicanery, or that CDA had evidence of significant abuse of discount claims that might provide support for a prophylactic ban. Instead, CDA effectively prohibited across-the-board discount offers,

whether truthful or not. No purported policy of preventing deception can justify that approach.[23]

Similarly, the law of deception does not prohibit broadly all representations that a seller's prices are "low" or a "bargain" in relation to others, and certainly not where the representations are accurate or can be substantiated. See *Tashof v. F.T.C.*, 437 F.2d 707, 710-11 (D.C. Cir. 1970) (comparing discount offers to prevailing prices). Once again, CDA's policy is to condemn categorically all representations regarding "low" or "affordable" prices, without any enquiry as to how those terms might be construed by consumers and whether, as construed, they are true of the particular practitioner making the claim.

CDA's condemnation of guarantees is likewise overbroad. While a guarantee of a specified medical outcome may well be misleading, a truthful promise to refund money (or to honor scheduled appointments) is certainly not. Commission guidelines identify the obligations of those who advertise guarantees. See Guides for the Advertising of Warranties and Guarantees, 16 C.F.R. Part 239 (1985). Barring some information that an advertiser has misrepresented or failed to honor a guarantee, such advertising cannot presumptively be condemned as deceptive.

In the same vein, CDA's broad prohibition on claims relating to the absolute or comparative quality of service finds no support in the law governing deception. Some

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[23] CDA suggests that its approach to discount advertising may be justified by reference to the Supreme Court's stated preference for "more disclosure, not less" in dealing with the regulation of deceptive speech under the First Amendment. Brief for Respondent 37-38 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977)). But the Court has expressed its preference for affirmative disclosures only as an alternative to prohibiting otherwise deceptive speech. Moreover, where, as here, speech is truthful and not misleading, the Supreme Court has shown great skepticism towards disclosure mandates that so burden the speech as to preclude it. See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 389-90 (1992).

general claims of quality, of course, are so recognizably statements of personal opinion that no substantiation is either possible or expected by reasonable consumers. Such "mere puffing" deceives no one and has never been subject to regulation. See Federal Trade Commission Policy Statement on Deception, 103 F.T.C. 174, 181 (1984) (appended to *Cliffdale Associates*); *Bristol-Myers Co.*, 102 F.T.C. 21,321 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

Respondent refers to the Supreme Court's suggestion in Bates, 433 U.S. at 383-84, that "'advertising claims as to the quality of [legal] services . . . are not susceptible of measurement or verification; accordingly such claims may be so likely to be misleading as to warrant restriction.'" Brief for Respondent 44 (quoting *Bates, supra*). We do not understand this language, however, to justify broad categorical prohibitions on quality claims of all sorts, without some effort to determine their accuracy or effect upon consumers. As the Court has more recently observed:

> "Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985)).

Insofar as claims of absolute or comparative professional quality (including claims made to alleviate patient anxiety) do implicate objective standards for which consumers would reasonably expect an advertiser to have proof, they may, of course, be proscribed upon a showing that particular claims are false or unsubstantiated. In our view, the requisite showing requires proof that specified claims are untrue or that advertisers lack "a reasonable basis for advertising

claims before they are disseminated." FTC Policy Statement regarding Advertising Substantiation, 104 F.T.C. 648, 839 (1983) (appended to *Thompson Medical Co., Inc.*). Likewise, even assuming *arguendo* that claims of quality and efficacy may so readily be equated with claims of superiority as many of CDA's interpretations appear to suggest, see IDF 194-204, the Commission "evaluates comparative advertising in the same manner as it evaluates all other advertising techniques," and "industry codes and interpretations that impose a higher standard of substantiation for comparative claims than for unilateral claims are inappropriate." Statement in Regard to Comparative Advertising, 16 C.F.R. § 14.15(c) (2).

Departing from its deception rationale, CDA seeks to justify its prohibition against dentists' provision of identifying information in school screening programs as a means of preventing exploitation of youthful consumers. This defense is inapt. While efforts to exploit youthful consumers and other particularly vulnerable groups have been challenged and condemned as deceptive and unfair in a variety of contexts,[24] that rationale is misplaced here, given that the only apparent commercial effect of furnishing the prohibited identifying information to children could be to provide their parents with the means of contacting the dentist.

We do not mean to deny that advertising that would otherwise be permissible might be harmful in the context of promoting dental services. See, *e.g.*, *AMA*, 94 F.T.C. at 1026

[24] See, *e.g.*, *ITT Continental Baking Co., Inc.*, 83 F.T.C. 865, 872 (1973), *aff'd*, 532 F.2d 207 (2d Cir. 1976) (finding advertisements tended to exploit emotional concerns of parents for children); *In re Travel King, Inc.*, 86 F.T.C. 715, 774 (1975) (holding deceptive the sale of "psychic surgery" to terminally ill patients); *Phillip Morris, Inc.*, 82 F.T.C. 16 (1973) (consent) (prohibiting distribution of unsolicited razor blades); *H.W. Kirchner*, 63 F.T.C. 1282, 1290 (1963) ("If, however, advertising is aimed at a specially susceptible group of people (e.g. children), its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed.").

("[W]hat may be false and deceptive for doctors may be permissible for sellers of other products and services. Harmless puffery for a household product may be deceptive in a medical context."); *National Ass'n of Social Workers*, 58 Fed. Reg. 17,411 (April 2, 1993) (consent order issued March 3, 1993) (prohibiting NASW from restricting advertising and solicitation, except insofar as it adopts reasonable principles regarding, *inter alia*, solicitation of testimonial endorsements from current psychotherapy patients); *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued December 16, 1992) (same). The advertising that a service is "painless," for example, may be inherently deceptive and harmful when used by a practicing dentist, whereas a similar claim by, say, an institution offering evening courses toward completion of a college diploma probably would not. But CDA has offered no convincing argument, let alone evidence, that consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising it restricts. See ID at 74-75. Indeed, as far as we can tell, advertising complaints typically came from fellow dentists, not from disappointed patients. See, *e.g.*, T. 849 (Dr. Abrahams), T. 926 (Dr. Yee).

We thus see no basis in this case for concluding that the advertising swept aside by CDA with broad strokes is categorically false, deceptive, or unfair.[25]

[25] In the light of CDA's practice, therefore, Commissioner Azcuenaga's insistence on further illumination of the "factual background" of "many of the letters" reprimanding dentists for their advertising is simply misplaced. See, *e.g.*, *post*, at 19. The citations discussed in the text do not provide further detail regarding the surrounding circumstances of the reprimand because the factual background against which the advertising claim was made was generally of little concern to CDA when it admonished the dentist involved.

For example, MARS was not concerned with any surrounding factual circumstances when it noted that "use of the words 'Affordable Prices,' is an inexact reference to fees, and therefore, violates . . . the CDA Code and Dental Practice Act," CX 772-A (1991), that "by using the phrase 'High Standards in Sterilization,' [dentists] are advertising in

4. Rule of Reason -- Conclusion

As our quick look under the rule of reason reveals, the advertising restrictions are likely to have anticompetitive effects, CDA has the necessary market power to harm competition by adopting the restraints, and there are no countervailing efficiencies or other business justifications

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violation [of state law and the CDA Code of Ethics for] advertising the performance of services in a superior manner," CX 394-B (1993), that a dentist "should avoid *any* statements that imply superiority in any future advertisements published on his behalf," CX 780-A (1992) (emphasis added), that "the phrase ['We Guarantee All Dental Work For 1 Year'] is a guarantee of dental services and, therefore, violates [state law and may subject the advertising dentist to disciplinary action by the association]," CX 557-C (1992), that "use of the phrase '10% Senior Citizen Discount,' violates [state law and CDA's Code of Ethics] by failing to list the dollar amount of the nondiscounted fee for each service, and inform the public of the length of time, if any, the discount will be honored," CX 585-A-B (1991), or that an advertisement, "'Call our office before December 31, 1992 and our gift to you and your family will be a Complete Consultation, Exam and X-rays (if needed) . . . [for only] a $1.00 charge to you and your entire family with this coupon,'" violated state law and CDA's Code of Ethics because it "fails to list the dollar amount of the non-discounted fee for each service," CX 444-A-B (1993). See generally Complaint Counsel's Proposed Findings of Fact, Volume III, Proposed Findings 580-949, and exhibits cited therein.

Furthermore, contrary to the suggestion by the dissent, it is immaterial that any given CDA censure was, perhaps, only one among a series of criticisms CDA issued with regard to that particular dentist. Cf. *post*, at note 20 ("The reference to 'quality dentistry' is one of several claims discussed in the MARS letter, and it appears that the committee's action was based partly on a finding that the dentist in question advertised that she was a member of the ADA when she was not.") (discussing CX 387-B); see also, *e.g.*, *id.*, at note 21 (discussing CX 478 and noting Judicial Council's objection to dentist's claim that laser surgery is revolutionary, while neglecting to note that dentist was also discouraged from advertising "gentle, comfortable and affordable" dentistry). The point of our reference to one of the restrictions that are at the heart of this case is that such advertising was held incompatible with membership in CDA. That message, regardless of whether it was coupled with citations for other (truly deceptive, unsubstantiated, false, or unfair) advertising as well, was clearly conveyed by CDA in each letter discussed in this opinion and in numerous others in the record.

that would justify the imposition of this kind of ban on broad categories of truthful and nondeceptive advertising. In short, CDA's advertising restrictions are unreasonable, make out a violation of Section 1 of the Sherman Act, and therefore violate Section 5 of the FTC Act. See *supra* note 5.

The result reached herein is not inconsistent with our earlier decisions in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988), and *Detroit Auto Dealers Ass'n, Inc.*, 111 F.T.C. 417 (1989), *aff'd*, 955 F.2d 457 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 461 (1992), which our holding today does not disturb.[26] In *Massachusetts Board of Optometry* we viewed the law of horizontal restraints after *NCAA* and *Broadcast Music* as presenting a series of questions, beginning with whether the restraint is "inherently suspect," that is, "the practice [is of] the kind that appears likely, absent an efficiency justification, to 'restrict competition and decrease output,'" and, if so, whether the agreement is supported by a plausible and valid efficiency justification. See 110 F.T.C. at 604. In that case we found the various advertising bans on discount advertising, affiliation advertising, use of testimonials, and sensational or flamboyant advertising to be inherently suspect, without a plausible efficiency justification, and, therefore, unlawful. *Id.* at 606-08. Following the same analytical steps in *Detroit Auto Dealers*, we likened an agreement among automobile dealers to limit showroom hours to a restriction on a form of output, found it inherently suspect and without a plausible efficiency justification, and thus declared it unlawful. 111 F.T.C. at 494-99.

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[26] With respect to Commissioner Azcuenaga's assertion that the majority opinion overrules the earlier Commission opinion in *Massachusetts Board of Optometry*, see, *post*, at 1, 37, it is true that the majority recognizes the existence of *per se* and rule-of-reason categories -- an approach to antitrust analysis that may have been blurred in the earlier decision. As to the remaining analysis in *Massachusetts Board of Optometry*, the assertion that we directly or indirectly overrule that decision is not correct.

If the instant case had been analyzed under the framework of those cases, we would have reached the same conclusion as we do here since, following *Massachusetts Board of Optometry*, we would find the restraints inherently suspect and without plausible or valid efficiency justification. Conversely, *Massachusetts Board of Optometry* and *Detroit Auto Dealers* would have arrived at the same result, had they been analyzed under the more traditional rule of reason/*per se* approach we employ here, since the restrictions in those cases either would have been found *per se* unlawful, such as the ban on discount advertising in *Massachusetts Board of Optometry*, or would have otherwise been shown to be unlawful under the rule of reason. A quick look at *Massachusetts Board of Optometry*, for example, would have demonstrated that the Board commanded sufficient market power since optometrists could not practice in the State without its approval, 110 F.T.C. at 605, that restraints, such as those on affiliation advertising, were likely to have an anticompetitive effect (and had, in part, a proven effect of raising prices), *id.* at 605-06, and that there was no efficiency or other legitimate business justification for the practice, *id.* at 606-08. In *Detroit Auto Dealers*, in turn, the Sixth Circuit indeed rejected the Commission's use of the "inherently suspect" approach on the grounds that it appeared to "aris[e] from a *per se* approach," 955 F.2d at 471, but affirmed the Commission's decision nonetheless after satisfying itself that the agreement had actual or potential anticompetitive effects, that the automobile dealers possessed market power, and that there was no valid justification for the practice, see 955 F.2d at 469-72. In this case, then, we have simply applied what we repeatedly recognized as the more "traditional antitrust analysis," *Massachusetts Board of Optometry*, 110 F.T.C. at 604 n.12, which does "not lead to different results" in the cases discussed, *Detroit Auto Dealers*, 111 F.T.C. at 494 n.18.

VI. STATE LAW DEFENSE

Finally, we turn to CDA's argument that its actions are lawful due to the existence of similar restrictions imposed on

advertising by the State of California. Ordinarily, a private party may properly invoke the "state action" defense only if first, the State has clearly articulated a policy to permit the allegedly anticompetitive practice, and second, the State is actively supervising the conduct at issue. See *F.T.C. v. Ticor Title Insurance Co.*, 504 U.S. 621, 631 (1992) (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)); *Parker v. Brown*, 317 U.S. 341, 351-52 (1943). CDA loses under this and any other offered version of a defense based on state law.

CDA originally raised an affirmative defense that "[t]o the extent [the] restrictions alleged . . . [in] the complaint [amount to] conduct which is prohibited by state law, such restrictions are lawful," and CDA expressly disavowed that this contention amounted to assertion of a traditional "state action" defense. See Order Striking Affirmative Defense at 1; Opposition to Motion to Strike Affirmative Defense at 3-4; Answer at 12. Presumably, and wisely we think, it declined to raise the traditional state action defense because CDA could present no argument that its activities were even remotely authorized or supervised by the State. CDA maintained, instead, that antitrust law should yield since California Business and Professions Code §§ 17,200 and 17,204 "authorize CDA to file a private right of action to prohibit violations of the Code,"[27] and more generally, "no anticompetitive effect results if an association's code of ethics incorporates state law, and one who violates state law is deemed to have violated the association's code of ethics." Opposition to Motion at 4. The ALJ struck the defense since, in the ALJ's view, it amounted in substance to a state

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[27] Section 17,200 of the California Business and Professions Code simply defines the term "unfair competition," and Section 17,204 provides that actions for injunctions under that chapter may be prosecuted by, among others, "any person acting for the interest of itself, its members or of the general public." There is no intimation that the statute authorizes prosecutions for unlawful actions before private tribunals.

action defense, which, as a facial matter, was unavailing in this case.

CDA has not entirely abandoned its attempt to find shelter under state law, maintaining this time around:

> "CDA reasonably believes that its interpretation of the Code of Ethics deters fraudulent advertising and advertising which is false or misleading in a material respect. The fact that during the relevant time period the State of California has also regulated advertising along the same lines as CDA in order to protect consumers from advertising that is false or misleading in a material respect further confirms the reasonableness of CDA's belief." Brief for Respondent 38.

This argument is less than clear but, indulging respondent for the moment, we will break it down into the following formulations, which at one point or another during the course of this litigation have been advanced by CDA: (1) CDA's actions are immune under the state action doctrine; (2) CDA has a defense under the antitrust laws because its prohibitions are the result of good faith reliance on parallel strictures of California law; (3) CDA's actions are efficient or otherwise reasonable since it is following state law; and (4) CDA's restrictions cannot harm competition because state law already imposes identical (or substantially similar) burdens on advertising for dental services.

Both the California Code and the regulations promulgated by the State Board of Dental examiners do, on their face, impose restrictions on advertising. See Cal. Bus. & Prof. Code §§ 651, 1680 (1994); Cal. Educ. Code § 51,520; 16 Cal. Code of Reg. §§ 1050-1053 (1993). Some of these, such as, for example, the Board's regulation regarding discount advertising, mirror the restriction imposed by

CDA.[28] Others, as, for example, the State's prohibitions on soliciting public school children, or on making superiority and guarantee claims, are clearly narrower in scope than

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[28] Title 26, Section 1051 of the California Code of Regulations, promulgated by the Board of Dental Examiners, provides:

> "An advertisement of a discount must:
>
> (a) List the dollar amount of the non-discounted fee for the service; and
>
> (b) List either the dollar amount of the discount fee or the percentage of the discount for the specific service;
>
> (c) Inform the public of length of time, if any, the discount will be honored; and
>
> (d) List verifiable fees pursuant to Section 651 of the Code; and
>
> (e) Identify specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." 16 Cal. Code of Reg. § 1051.

Although the ALJ appears to have concluded that the Board rescinded its elaborate disclosure requirement around 1985, IDF 237 (citing CX 1622), we are less convinced that the undated document on which the ALJ relied was issued in 1985. In light of the document's summary of Section 1680 of the California Business and Professions Code, we surmise instead that it dates from sometime between 1974 and 1978, and, since it appears that in 1975 the Board had not yet promulgated regulations regarding discount advertising, the document cited by the ALJ could just as well represent an articulation of the Board's view prior to promulgation of the more extensive disclosure standards. If that is indeed the case the document is simply superseded by Section 1051 of the Board's regulations.

In any event, we do not express an opinion on the potential conflict between Section 1051 of the regulations and subsection 651(i) of the California Business Code, which provides a counterbalance to demands for specificity:

> "A board or committee shall not, by regulation, unreasonably prevent truthful, nondeceptive price or otherwise lawful forms of advertising of services or commodities, by either outright prohibition or imposition of onerous disclosure requirements."

CDA's policy.[29] CDA's defense, however, is inapt in either case.

The first version of CDA's state action defense comes up strikingly short on the grounds that the law never contemplated private enforcement of its standards and that the State does not supervise CDA's enforcement of advertising restrictions. Respondent admitted that it is neither an agent of the State, nor authorized to interpret or enforce state laws on behalf of the State, Answer at 12, and our own review of the law finds no hint that CDA or any private association should be permitted to interpret or enforce these laws on its own. Cf. *Parker*, 317 U.S. at 350. But even mere authorization would not be enough, since, as the Court emphasized in *Parker*, "a state does not give

[29] California Education Code § 51,520 does not prohibit all distribution of identifying information to public and private students, but more narrowly provides:

> "During school hours, and within one hour before the time of opening and within one hour after the time of closing of school, pupils of the public school shall not be solicited on school premises . . . to subscribe or contribute to the funds of, to become members of, or to work for, any organization not directly under the control of the school authorities [with certain exceptions not relevant here]."

Similarly, Section 1680 of the California Business and Professions Code appears on its face to cover some of what CDA prohibits, but it does not prohibit all quality claims, instead defining "unprofessional" conduct to include in relevant part:

> "(i) The advertising of either professional superiority or the advertising of performance of professional services in a superior manner. . . .
>
> . . .
>
> "(1) The advertising to guarantee any dental service, . . . This subdivision shall not prohibit advertising permitted by Section 651."

immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351 (citation omitted). Without active supervision of the enforcement, there can be "no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick* v. *Burget*, 486 U.S. 94, 101-02 (1988). See also *Ticor*, 504 U.S. at 637-640; *Indiana Federation of Dentists*, 476 U.S. at 465; *Bates*, 433 U.S. at 359-63; *American Medical Ass'n v. United States*, 130 F.2d 233, 249 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943).[30] Here, there is absolutely no evidence of active state supervision of CDA's disciplinary actions or of the content of its substantive advertising restrictions. CDA's ethical review of applicants' and members' advertising is thus entirely insulated from state supervision, and thus beyond any traditional state action immunity to the antitrust laws.

This case epitomizes the danger of imputing to the State a policy choice when its implementation is not being actively supervised by the State itself. In 1985, and apparently again in 1988, a Deputy Attorney General of California addressed a memorandum to the Board of Dental Examiners, advising it of recent Supreme Court decisions in the First Amendment area and asking the Board to ensure that enforcement of the law be consistent with the Constitution. See CX 1425; CX 1621-A. In response, the Legal Services Unit of the Department of Consumer Affairs[31] prepared a discussion paper analyzing the constitutionality and wisdom of limits placed on dentists' advertising. CX 1621.[32] The paper

[30] The question of state action immunity, decided in *American Medical Association v. United States*, by the Court of Appeals, was apparently not raised in the Supreme Court. See 317 U.S. at 527-28.

[31] The Board of Dental Examiners is part of the Department of Consumer Affairs. See Cal. Bus. and Prof Code § 101.

[32] As indicated in the memorandum, it addresses these issues in the context of the Board's investigation of CDA's own advertising practices. Thus, the memorandum also provides the only documented instance in which the Board initiated enforcement of the laws. We do

concludes, among other things, that recent United States Supreme Court decisions "probably invalidate the present California statutes and regulations prohibiting dentists from advertising 'superiority,'" since "[l]ike price and other facts of importance to the consumer, [truthful and nondeceptive] expressions regarding the quality of the advertiser's services are protected by the First Amendment." CX 1621-D. See also CX 1621-z-2. The paper also recognizes that to be consistent with the First Amendment, a State ought not to prohibit dentists from making claims that amount to "puffery," CX 1621-E, advertising that their prices are "very reasonable," CX 1621-V, or promoting their services by truthful and nondeceptive guarantees, CX 1621-z-4. Ultimately, it recommends:

> "The statutes and regulations that limit advertising by dentists should probably be amended to eliminate patent conflicts with the federal constitutional provisions. At present, except in the telephone yellow pages, there seems to be relatively little advertising by dentists. . . . It is possible that the California statutes and regulations have made the risk of truthful and non-deceptive advertising too great for most dentists to freely tell the public about the services they provide and the prices they charge. It is also possible that the relative absence of dental advertising has harmed these segments of the public who do not use dental services because they are not conscious of their availability or cost. In any event, any California statutes and regulations that patently conflict with the federal Constitution should be repealed or amended so as to eliminate any disparity between the two sources of law." CX 1621-E. See also CX 1621-z-13 to z-15.

To be sure, the discussion paper cannot supersede codified law, and, conversely, its relevance is not limited to

not know whether this enforcement action was abandoned after issuance of the discussion paper.

the sections that signal a retreat from the written code.[33] But the document provides a rather dramatic indication of the perils of private enforcement in the absence of active state supervision. Behind the scenes, officials were reexamining the legality and wisdom of the previously charted course. This might even explain the lack of enforcement. Holding that CDA's restrictions are shielded by the state action doctrine in this case would amount to imposing a continued policy choice upon the State when it has rarely, if ever, pursued it actively.[34]

Beyond the traditional state action defense, antitrust law does not, to our knowledge, recognize a "good faith" defense for a private conspiracy formed to enforce state law. It might be unobjectionable if CDA were to exclude members who had been found by the state Board to have violated the state statute or Board rules. That is not what CDA did. Instead, CDA appointed itself as an extra-judicial administrator of the law. We have long rejected the argument that "Congress intended for federal antitrust laws to give way when private parties, by conduct that would otherwise violate the antitrust laws, take it upon themselves to enforce their interpretation of the provisions of any state law." *Indiana Federation of Dentists*, 101 F.T.C. 57, 181 (1983), *rev'd* on other grounds, 745 F.2d 1124 (7th Cir. 1984), *rev'd*, 476 U.S. 447 (1986). As we indicated in that case, "[n]o Supreme Court decision articulating the state action doctrine can be read to endorse such an interpretation of congressional intent." *Id.* at 181-82.

In the 1942 case involving the AMA, for example, the Justice Department challenged the association's attempt to prevent physicians from affiliating with a prepaid health

[33] Indeed the document took the position that the disclosure requirements for discount advertising were consistent with recent Supreme Court decisions. See CX 1621-z-7.

[34] Due to the lack of Board enforcement, state judicial review has been limited as well. See *Ticor*, 504 U.S. at 638-39 ("[b]ecause of the state agencies' limited role and participation, state judicial review was likewise limited").

plan. The Court of Appeals rejected the AMA's argument that its conduct was not in violation of the antitrust laws because such affiliations were illegal:

> "Appellants are not law enforcement agencies; they are charged with no duties of investigating or prosecuting, to say nothing of convicting and punishing. . . . Except for their size, their prestige and their otherwise commendable activities, their conduct in the present case differs not at all from that of any other extra-governmental agency which assumes power to challenge alleged wrongdoing by taking the law into its own hands." *American Medical Ass'n,* 130 F.2d at 249.

In *Indiana Federation of Dentists,* the Supreme Court was even more explicit. The state law appeared to prevent the lay screening of dental x-rays by lay employees of insurers, and the Court held that, even assuming the association's boycott was consonant with the state law, it was not protected:

> "That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it. See *Fashion Originators' Guild of America, Inc.* v. *F.T.C.,* 312 U.S. 457, 468 (1941). Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the state. See *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 57 (1985). There is no suggestion of any such active supervision here; accordingly, whether or not the policy the Federation has taken upon itself to advance is consistent with the policy of the State of Indiana, the Federation's activities are subject to Sherman Act condemnation." 476 U.S. at 465.

In short, absent active state supervision, private enforcement by CDA cannot be protected from antitrust challenge.

Even entertaining the theoretical viability of the weaker claim that the state law furnishes corroboration for CDA's belief that its practice is pro-competitive, such an argument fails on the facts of this case. Although CDA urges that it enforced what it reasonably perceived to be state law, it does not point to a single instance in which the State enforced its advertising proscriptions against a dentist. To the contrary, CDA was acutely aware that the Board had virtually abandoned its advertising regulations; indeed, CDA perceived itself as filling an enforcement void. See IDF 231-33. Moreover, CDA did not seriously attempt to ascertain the Board's views of the proper scope of state law. See, *e.g.*, T. 1034, 1046 (Dr. Lee); T. 1537 (Dr. Nakashima); see generally, IDF 241-42. As a result, CDA lacks any real basis for understanding the true extent of the restrictions imposed by the State and cannot realistically claim that it is furthering the State's current policy choice.

Finally, and for much the same reason, we reject the argument that respondent's advertising restrictions were harmless because of the existence of similar, or even identical, state laws. Given the absence of state enforcement, it was CDA, not California, that tampered with the workings of the market for dental services. *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 17 F.3d 295 (9th Cir.), *cert. denied*, 115 S. Ct. 66 (1994), illustrates the point. In *Sessions*, the defendant had caused a private standard setting association to change its model fire code so as to disapprove of plaintiff's method of renovating leaking storage tanks for hazardous fluids. As a result, many fire officials refused to issue the necessary permit for plaintiff to perform its services. The court ruled for defendant on the theory that the harm was not caused by defendant's anticompetitive activity, but by the refusal of the fire officials to issue the permits, that is, by valid governmental action. The Ninth Circuit found:

> "[Plaintiff] has never proved that it sustained injuries from anything other than the actions of municipal authorities. . . . [Plaintiff] has not shown that any

> potential . . . customer in jurisdictions that were not enforcing the . . . [model fire code] decided not to engage [plaintiff]'s services because of the [association]'s adoption of [the provision in dispute]. Nor has [plaintiff] adduced any evidence that [defendant]'s actions caused independent marketplace harm in jurisdictions that continued to permit [the procedure offered by plaintiff]. . . . The injuries for which [plaintiff] seeks recovery flowed directly from government action." 17 F.3d at 299.

CDA would not be protected even by this broad view of the state action shield. For in our case, in contrast to *Sessions*, California apparently did not independently enforce the written law, and certainly was not alleged to have done so with regard to any of the individual dentists censured by CDA. In other words, here the sole source of enforcement was CDA, not the State. The anticompetitive harm is thus not the result of government action, but that of the private conspiracy alone.

Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612 (6th Cir. 1982), further illuminates how the instant case differs from one in which dentists are merely following the law as authoritatively and actively interpreted and enforced by state authorities. In *Gambrel*, consumers filed an action against the Kentucky Board of Dentistry, the Kentucky Dental Association, and individual dentists alleging a conspiracy to withhold denture prescriptions from patients with the result that patients were precluded from shopping around to find the least expensive means of filling the order. Respondent Board of Dentistry argued that state law prohibited dentists from handing work orders over to patients. The court found that the Board's view was the right interpretation of state law and that the dentists were compelled by state law to deliver work orders directly to dental technicians. *Id.* at 619. In explaining that this policy was actively supervised by the State, the court noted:

> "First, the policy emanates directly from the language of a state statute and not from any agreements by private individuals. . . . Secondly, the powers of enforcement are expressly conferred upon the Board of Dentistry, and it appears that historically the Board has indeed acted to uphold and enforce the regulatory scheme. In fact, the enforcement of the statute by the Board against plaintiff Gambrel and others has been one of the impelling reasons for the commencement of this action." 689 F.2d at 620.

CDA has done more than transcribe applicable state law into its Code of Ethics and urge its members to respect the law. First, the state law upon which it relied was, to its knowledge, not being actively enforced by state authorities, and second, CDA was itself actively policing its version of state law. We are aware of no antitrust exemption that would shield such activity.

VII. FINAL ORDER

An order prohibiting respondent from continuing to restrict truthful and nondeceptive advertising and, in particular, from further enforcing its current unreasonable restraints is necessary and in the public interest. The order we impose is similar to those entered in other cases in which we had found unlawful interference with advertising by professional associations, but crafted to reflect the respondent's particular circumstances. See, *e.g.*, *Massachusetts Board of Optometry*, 110 F.T.C. at 632-35; *American Dental Ass'n*, 100 F.T.C. 448, 449-53 (1982); *AMA*, 94 F.T.C. at 1036-41. We believe this remedy to have a "reasonable relation to the unlawful practices found to exist," and therefore to be within our authority to impose. See *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 613 (1946).

Our order that respondent cease and desist from interfering with such truthful and nondeceptive advertising, Order Part II, leaves respondent free to act against member advertising that it reasonably believes would be false or

misleading within the meaning of Section 5 of the Federal Trade Commission Act, and against its members' uninvited, in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence. The order also leaves respondent free to encourage its members to obey state law and to discipline members who have been reprimanded, disciplined, or sentenced by any court or any state authority of competent jurisdiction.[35]

Respondent must, however, cease and desist from the unlawful suppression of advertising, and from urging others to engage in such actions, Order Part II, as well as eliminate unlawful provisions from any policy statement and terminate affiliation with components that would continue to engage in behavior that would be contrary to the order if engaged in by respondent, Order Part III. The disaffiliation provision, particularly with its grace period to permit continued affiliation with components that will discontinue practices that, if engaged in by the respondent, would be unlawful, Part III.B., reflects the approach of the Commission order issued in *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued December 16, 1992). Part III.A.1, which contained an erroneous reference to section 21 of CDA's Code of Ethics, has been changed to reflect the proper section of CDA's code (Section 22) that deals with claims of exclusivity.

[35] The ALJ's order prohibited CDA form restricting representations that do not contribute to the public esteem of the profession. See ID at 81 (Order at II.A.8). Our order omits that provision. Although CDA cited the goal of protecting the public esteem of the profession in prohibiting dentists from distributing certain information during school screenings, see, *e.g.*, CX 1115-A, we find that our order adequately addresses CDA's unlawful activity and refrain from including the broader provision at this time. Of course, to the extent that respondent were to use this as an excuse to reinstitute any of the practices that we have found to violate Section 5, such actions would violate the order.

To publicize its change in long-held policy, respondent must inform current members of this action and the resulting change in policy. Order Part IV.A. Notification requirements have long been recognized as falling within our remedial authority. See, *e.g.*, *Massachusetts Board of Optometry*, 110 F.T.C. at 619. Respondent asks that we not require it to distribute its *Journal* via first class mail. We see no reason to do so, and neither does complaint counsel. Accordingly, we have amended Judge Parker's order on this point to reflect unambiguously that we require only the complaint, order, and announcement, as well as any documents revised pursuant to Part III.A, but not the *CDA Journal* itself, to be distributed via first class mail. Respondent also objects to the requirement that it distribute the complaint on the grounds that complaint counsel failed to prove all the allegations therein. Since we find that complaint counsel has proved all the allegations in the complaint, respondent's objection on this point is denied.

Because respondent's restraints have been successfully imposed over an extended period of time dating back well over a decade, we find it necessary and reasonable to include further remedial provisions aimed at reversing the suppression of advertising (and, thereby, of competition) respondent has achieved over the years. Respondent must therefore inform persons, who are currently subject to disciplinary order or suspended from membership by reason of their or their employers' advertising or solicitation practices, of the complaint and order in the required manner, reconsider the disciplinary or other proceeding, and inform the person of its decision upon reconsideration. Part IV.B. Respondent has asked that we extend the time under Parts IV.B.2 and IV.B.3 to one hundred and twenty days, due to the alleged difficulty of locating and reviewing relevant old files. Although complaint counsel correctly notes that respondent's arguments regarding its need for time are rather conclusory, we do not see the public interest compromised in this case by permitting respondent to conduct the review and final notification of this group of persons within one hundred and twenty days, provided the persons described in Part

IV.B. (*i.e.* those who are currently subject to discipline or suspension due to their advertising or solicitation practices) are notified and informed in the manner described in Part IV.B.1 within thirty days.

Next, respondent is to distribute similar information, including an application form for membership, to those whose membership over the last ten years was not approved or was discontinued as a result of CDA's objections to advertising or solicitation practices. Respondent is to review any application for membership received in response and inform persons of their acceptance or of the reasons for denial of their application. Part IV.C. Respondent has asked that we strike this provision, arguing that "applications are received, processed, and stored at the component level and the components are not respondents in this action; moreover, complete records covering a ten year period may not exist." Brief for Respondent 82. In reviewing the record in this case, we have found significant cooperation between respondent and its component societies in the course of hundreds of disciplinary proceedings, leading us to believe that respondent can count on the usual and customary cooperation of its affiliated components in this matter. Finally, respondent has not even alleged, let alone provided any evidence, that complete records covering the last ten years do not, in fact, exist. We therefore see no reason, at this time, to alter Judge Parker's order on this point.

Respondent must also distribute certain information to every new applicant for the next five years, Part IV.D, keep, and file with the FTC, records of each action taken with respect to the advertising of the sale of dental services for three years, Part V, establish an internal compliance procedure for the next five years to ensure that the order is complied with at all levels of the organization and file progress reports at specified times, Part VI.A-C, maintain and make available for inspection records of specified actions relevant to this order, Part VI.D., and notify the FTC of specified organizational changes, Part VI.E. These record-keeping provisions are essential given respondent's

continued assertion that the unreasonable restraints were imposed only in an effort to suppress untruthful or deceptive advertising, or such advertising that would cause unreasonable, unavoidable harm to consumers. In order to permit proper review of respondent's actions in the future, particularly in light of the safe harbor carved out by the order, the record-keeping and reporting requirements are, in our view, reasonable and reflect similar requirements imposed in other cases. *See, e.g., American Psychological Ass'n*, 57 Fed. Reg. at 46,030; *Medical Staff of Memorial Medical Center*, 110 F.T.C. 541, 547 (1988); *Tarrant County Medical Society*, 110 F.T.C. 119, 123 (1987).

Finally, we have added to Judge Parker's order a sunset provision reflecting the Commission's recently adopted policy in that regard. Federal Trade Commission, Duration of Existing Competition and Consumer Protection Orders, 60 Fed. Reg. 42,481 (Aug. 16, 1995).

VIII. Conclusion

The California Dental Association has declared itself the arbiter of good advertising by member dentists and, in so doing, has restrained competition among its members in violation of Section 5 of the FTC Act. Without impugning CDA's general efforts to serve the public, we find that the Association's core activities provide its members sufficient pecuniary benefits to bring it squarely within our jurisdiction. We find further that CDA is at the hub of an agreement among its members to restrict competition in the market for dental services, and it is legally quite capable of serving that role. The combination has suppressed advertising of the prices, quality, and availability of dental services in California, thereby impairing the dissemination of information that is important to consumers and forms a basis of rivalry among competing service providers. The attack on price competition, long recognized as the lifeblood of a free economy, is inexcusable in principle and must be categorically condemned even in the professional setting before us here. The restrictions on advertising of the quality

and availability of professional services, on the other hand, are entitled to a quick look under an individualized examination of the competitive benefits and burdens they entail. Since CDA's restraints fall far short of being justified even under this approach, however, we find that they are unlawful as well.

DISSENTING OPINION OF COMMISSIONER MARY L. AZCUENAGA
in California Dental Association, D. 9259

As described in the opinion of the majority, the conduct at issue in this case carries a patina of unlawfulness that few could disregard. Restraints on advertising long have been suspect under the law. Those who would practice such restraints have been pressed increasingly to justify their conduct, and rightly so. But the gloss applied by the majority to the evidence in this case, although mesmerizing, proves chimerical on examination, like the glow of a firefly that captivates us for a time but does not withstand the hard light of day. Certainly there is evidence in the record on which to base suspicion, but it is exceedingly meager and falls short of establishing liability when viewed in context with other evidence and the law. I cannot join my colleagues in finding liability on this record. Also, I cannot join my colleagues in overruling Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988) ("Mass. Board").

Although I do not join the Commission in overruling Mass. Board, I have analyzed the case using the same traditional analysis as the majority, and there is much in the majority's opinion with which I agree. I concur in the conclusion that the Commission has jurisdiction over the California Dental Association ("CDA"). In addition, I agree that a categorical and complete ban on price advertising, imposed by a trade or professional association, would be per se unlawful and that before condemning an association's restrictions on nonprice advertising under Section 5 of the FTC Act, the Commission should perform a rule of reason

analysis. Finally, I agree that the CDA has not made out a state action defense.

Despite these areas of agreement, I must dissent. In reviewing the record, the Commission has not come to grips with the true nature and extent of CDA's restrictions on advertising. The facts are hotly contested by the parties. CDA insists that it prohibits only false and misleading advertising, as defined by the state law of California, and attributes incidents of excessive restraints to local dental societies that were not named in the complaint. Complaint counsel argue that CDA bans a wide range of useful and informative advertising that would not be considered deceptive under Section 5 of the FTC Act.

The theory of liability is that CDA enforced facially legitimate rules against false and deceptive advertising in such a way as to limit truthful advertising. Such a finding should rest on evidence of a pattern of enforcement decisions. I question whether the evidence cited in the Commission opinion supports finding such a pattern. This is particularly true given the strong indications in the record that CDA's enforcement did not have the sweeping impact suggested by the majority.

With respect to restraints on price advertising, I question whether CDA in fact imposed such a clear ban as to bring its conduct within the per se rule, and the prudent course would be to remand for additional findings of fact. Restraints on price advertising that do not constitute such a ban, such as disclosure requirements that may have some informational benefit to consumers and impose some burden on advertisers, also may be unlawful[1] but should be addressed under the rule of reason. The effect of restraints on nonprice advertising on the price and output of the advertised product may be more

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[1] "Restrictions on price advertising are unlawful because they are aimed at 'affecting the market price.'" Massachusetts Board of Registration in Optometry, 110 F.T.C. 549, 606 (1988) quoting United States v. Gasoline Retailers Ass'n, 285 F.2d 688, 691 (7th Cir. 1961).

attenuated and also should be addressed under the rule of reason. The evidence that CDA imposed restraints on nonprice advertising by its members is weak, but even assuming such conduct occurred, the analysis of the majority does not support a holding of liability.

I disagree with the conclusion of the majority that CDA has market power. In presenting their case, complaint counsel relied on a theory of virtual per se illegality and did not offer evidence, even in the form of testimony of an expert economist, on fundamental elements of a rule of reason analysis, such as market definition, barriers to entry and anticompetitive effects. CDA did introduce economic evidence that it has no market power, and the Administrative Law Judge agreed. The majority reverses, entering a de novo finding of market power. Slip Op. at 32. Some persuasive evidence of market power is essential to a finding of liability under the rule of reason. The evidence of market power here is so sparse and superficial as to be virtually nonexistent. Imposing liability on this record for restraints on nonprice advertising is functionally equivalent to condemning them under the per se rule.

I disagree with the conclusion of the majority that entry into the California dental market is difficult. The majority's analysis of the evidence on entry seems highly inconsistent with the Commission's usual analysis and, absent explanation, appears to suggest that the Commission has significantly relaxed its standard for establishing that entry is difficult. A quick look analysis based on a limited record has much to recommend it, but only if that record is held to the same standards of analysis as in a more extensive review. No anticompetitive effects having been shown, the complaint should be dismissed with respect to the conduct judged under the rule of reason.

I.

The opinion of the majority implicitly overrules the method of analysis set forth in Massachusetts Board of

Registration in Optometry, 110 F.T.C. 549, 602-04 (1988). Whatever the reason for failing to use the word "overrule," it will be clear to any reasonable lawyer that that is what the majority has done. Instead of adhering to Mass. Board, the Commission endorses the traditional dichotomy between per se and rule of reason analysis. Slip Op. at 16.

It will be unfortunate if the Commission's decision signals a return to the analysis of old in which the significance of competitive effects and efficiencies was sometimes obscured by efforts to fit conduct in either the per se or rule of reason pigeonhole. In 1988, when the Commission decided Mass. Board, Supreme Court decisions had opened the door to an antitrust analysis that focuses more on competitive effects and efficiencies than on labels.[2] Mass. Board was a considered attempt to further that trend. Because there have been few opportunities for the Commission to explain Mass. Board in the context of a fully developed record, no body of precedent implementing its focus on competitive effects and efficiencies has evolved.[3]

The analytical framework set forth in Mass. Board, properly applied, has much to recommend it. This case presents an excellent opportunity to clarify and build on Mass. Board.[4] One particularly disappointing aspect of the opinion of the majority is the absence of a satisfactory discussion of efficiencies, the omission of which would have been more glaring if the Commission had used a Mass.

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[2] See NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984); Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979).

[3] Perhaps not surprisingly, Mass Board, a precedent-setting case in terms of the Commission's analytical approach, created a number of analytical difficulties that were left for resolution in future cases. See, e.g., Azcuenaga, "Market Power as a Screen in Evaluating Horizontal Restraints," 60 Antitrust L.J. 935, 939 (1992).

[4] The Administrative Law Judge misapplied the Mass. Board analysis in his Initial Decision, and the opinion has been widely misconstrued elsewhere.

Board analysis.[5] The decision of the majority to cast Mass. Board aside before exploring its potential is cavalier and premature and sends the wrong signal about the importance of careful economic analysis, particularly the consideration of efficiencies.[6]

II.

At this point in an administrative proceeding, the nature and extent of CDA's restrictions on advertising should be well defined and substantiated, but they remain remarkably murky in this case. One difficulty in reviewing the record is that complaint counsel evidently assumed that actions by local dental societies are attributable to CDA, although the complaint did not name the local dental societies and the record does not establish that the local societies acted under the direction and control of CDA. Although complaint counsel submitted numerous exhibits relating to enforcement over a period of many years, most of those exhibits relate to enforcement by local dental societies, not by CDA. Some of the exhibits, which go back to the early 1980's, apparently do not reflect current or even recent CDA practice. Tr. 851. The majority seems to agree with CDA's argument that it cannot be condemned on the basis of acts by local societies without some evidence linking CDA to the challenged conduct.

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[5] One source of confusion under Mass. Board is that the term "efficiencies" as used in that opinion and in antitrust analysis generally encompasses much more than simple savings in terms of dollars and cents. In the antitrust lexicon, "efficiencies" includes valid business justifications such as explanations of why a particular product or service could not be brought to market absent the conduct that is subject to examination, the need to differentiate a product, or other circumstances consistent with a procompetitive rationale.

[6] Although I do not join Commissioner Starek's separate opinion, his discussion of the virtues of the analytical approach in Mass. Board over that employed by the majority has a good deal of merit.

The majority does not adopt the findings of fact in the Initial Decision and, disclaiming reliance on those findings, relies instead on its "independent review of the record." Slip Op. at 10 n.6.[7] The majority characterizes the CDA's actions, but despite its independent review, offers little in the way of findings of fact to resolve important disagreements between the parties.[8]

The opinion of the majority fails to reconcile, or otherwise dispose of, conflicting evidence on a number of significant issues. A fundamental question is whether and to what extent CDA has restricted advertising by California dentists. On this record, it is difficult to find that CDA's restrictions adversely affected dentists who want to advertise or that the restrictions caused anticompetitive effects. Although CDA discouraged specific advertisements (usually

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[7] On appeal, the Commission conducts a de novo review. 16 C.F.R. § 3.54 (a) ("Upon appeal from or review of an initial decision, the Commission * * * will, to the extent necessary or desirable, exercise all the powers which it could have excised if it had made the initial decision."); The Coca Cola Bottling Co. of the Southwest, 5 Trade Reg. Rep. (CCH) ¶ 23, 681 at 23, 405 (FTC 1994) ("Our review of this matter is de novo.").

[8] To rebut this dissent, the majority offers not 6 at page 10, a footnote of impressive length, that cites CDA actions relating to sixty-two dentists. On examination, the examples cited fail to match the promise of rebuttal presaged by the length of the note. Thirty-eight of the sixty-two examples support a finding of the majority with which I agree, i.e., "[t]he record supports the majority's finding that CDA enforces the disclosure requirements imposed by the California State Board of Dental Examiners." See text accompanying note 16, infra. Eleven examples of claims related to fees are not inconsistent with my view that the broad characterizations of the majority regarding restraints on fees cannot stand in light of probative, conflicting evidence. See note 15, infra. Seven more examples of superiority claims based on sterilization practices fail to answer the fundamental question I have raised whether this particular interpretation may be justified. See not 23 and accompanying test, infra. The same can be said for four examples of CDA actions based on a theory of unjustified expectations. See note 21, infra. Other examples cited in note 6 are discussed in the text of the majority opinion and in the text of this dissent.

advertisements that violated state statutes or regulations defining and prohibiting deception), there is not empirical evidence in the record that CDA members advertise less frequently than dentists in California who are not members of CDA or that dentists in California advertise less than dentists in other states.

In fact, the preponderance of the evidence suggests that some advertising by dentists is flourishing in California. CDA, in a very graphic demonstration, filed a one and one-half inch thick appendix of telephone yellow pages advertising by California dentists. Mr. Christensen, a witness called by complaint counsel, who owns an advertising agency in Corte Madera, California, testified about his fifteen years of experience specializing in advertising and marketing by dentists. Tr. 545, 571. He said that most incidents of advertising restrictions by CDA occurred in the early 1980's. Tr. 609. Mr. Christensen testified that since 1988, he had heard of only one or two letters from dental societies regarding advertising. Tr. 616-17. His "Manual," which is furnished to clients of his advertising agency to apprise them of his approach to marketing and advertising by dentists, advises that a dentist can say what he wants as long as it is not false or misleading. Tr. 616-17; RX 72 at 111. Another of complaint counsel's witnesses testified about building a dental practice with a marketing campaign that was the "[m]ost aggressive I've ever seen," while remaining an active member of CDA. Tr. 790, 765-66. On balance, given the absence of evidence showing a reduction in advertising, the record suggests that CDA has not deterred dentists in California from advertising.

I cannot joint the majority's expansive characterizations of CDA's actions. See Slip Op. at 17. With respect to price and discount advertising, the majority draws unqualified conclusions regarding the "effective prohibition of advertising," the "silencing effect" of CDA and the imposition of a broad ban on price advertising. Slip Op. at 17-19. With respect to nonprice claims, the majority draws broad conclusions that the nonprice advertising proscribed by

CDA is vast and that CDA effectively bans all quality claims. Slip Op. at 25. As discussed below, I believe that these characterizations overstate the evidence.

1. Alleged Restraints on Price Advertising

I agree with the majority that a private conspiracy to prohibit price advertising is per se unlawful. Under the per se rule, the first and ultimate question in deciding liability is whether CDA in fact prohibits price advertising. CDA has no rule or other explicit prohibition against price advertising.

It is possible, however, that the association in effect prohibits price advertising by the manner in which it interprets and enforces facially legitimate rules. Does CDA do so? The evidence is conflicting. CDA officials testified that its standard for evaluating advertisements is whether the advertisement is false or misleading, but a new CDA actions cited by the majority, particularly letters by CDA's membership application review committee, are not easily reconciled with the testimony. On balance, I question whether the record provides a sufficient basis to find that CDA prohibits price advertising.

Members of CDA must agree to abide by the association's constitution, bylaws and Code of Ethics. Slip Op. at 3. Section 10 of CDA's Code of Ethics provides:

> Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect. (CX-1484-Z-49.)

On its face, Section 10 of the CDA Code seems unobjectionable,[9] and the majority fails to identify specific language in Section 10 that explicitly or implicitly prohibits truthful advertising.

The majority also refers to several CDA advisory opinions. Advisory opinions are not part of the Code of Ethics, and a dentist does not necessarily subscribe to the advise by joining CDA, although he or she agrees to abide by the official rulings of the organization.[10] The only prohibition in the CDA's ethical code is against false and misleading advertising. The difficult question is whether CDA in effect prohibited price advertising.

Advisory Opinions 2(b), 2(d), 3 and 4 are singled out by the majority for particular attention.[11] Slip Op. at 17. The

[9] The first and third sentences of Section 10 merely prohibit false and misleading advertising. The second sentence relating to "the esteem of the public" is somewhat ambiguous, but the CDA enforcement actions cited in the opinion of the majority do not rely on this sentence.

[10] The preamble to the Code of Ethics states:

> The CDA Judicial Council may, from time to time, issue advisory opinions setting forth the council's interpretations of the principles set forth in this Code. Such advisory opinions are 'advisory' only and are not binding interpretations and do not become a part of this Code, but they may be considered as persuasive by the trial body and any disciplinary proceedings under the CDA Bylaws. (CX-1484-Z-47.)

[11] They provide:

2. A statement or claim is false or misleading in any material respect when it:

(b) Is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts; . . .

(d) Relates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors; . . .

majority neither analyzes the specific language of these advisory opinions nor holds them unlawful on their face.[12] These CDA advisory opinions appear to derive from and not extend beyond the scope of the California state law of deception. Section 651 of the California Business and Professions Code prohibits the dissemination of false or misleading information by health care professionals, including dentists.[13]

3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as "as low as," "and up," "lowest prices," or words or phrases of similar import.

4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity--for example, "low fees"--must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity. (CX-1484-Z-49-50).

[12] Section III(A)(2) of the order requires CDA to remove Advisory Opinions 2(c), 2(d), 3, 4, and 8. Opinion 2(c) states that a statement is misleading when it "is intended or is likely to create false or unjustified expectations of favorable results and/or costs."

[13] The statute, which was amended in 1992, with the changes effective January 1, 1993, provides, in part:

(b) A false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which does any of the following:

(2) Is likely to mislead or deceive because of a failure to disclose material facts.

(3) Is intended or is likely to create false or unjustified expectations of favorable results.

(4) Relates to fees, other than a standard consultation fee or a range of fees for specific types of services, without fully and specifically disclosing all variables and other material factors . . . .

(c) Any price advertisement shall be exact, without the use of such phrases as "as low as," "and up," "lowest prices" or words or phrases of similar import. Any advertisement which refers to services, or costs for

The language of the CDA advisory opinions is very close, but not identical, to that of the statutes. Opinion 2(b) defines as false and misleading a statement that "[i]s likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts," and Section 651(b)(2) of the statute covers a statement that "[i]s likely to mislead or deceive because of a failure to disclosure material facts." Opinion 2(d) defines as false and misleading a statement that "[r]elates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors," and Section 651(b)(4) includes a statement that "[r]elates to fees, other than a standard consultation fee or a range of fees for specific types of services, without fully and specifically disclosing all variables and other material factors."

Opinion 3 provides that price advertisements "shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import." Section 651(c) provides that price advertising "shall be exact, without the use of phrases as 'as low as,' 'and up,' 'lowest prices' or words or phrases of similar import," and also that "[t]he price for each product or service shall be clearly identifiable."

Advisory Opinion 4 provides "[a]ny advertisement which refers to the cost of dental services and uses words of

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services, and which uses words of comparison must be based on verifiable data substantiating the comparison. Any person so advertising shall be prepared to provide information sufficient to establish the accuracy of that comparison. Price advertising shall not be fraudulent, deceitful, or misleading, including statements or advertisements of bait, discount, premiums, gifts, or any statements of a similar nature. In connection with price advertising, the price for each product or service shall be clearly identifiable. The price advertised for products shall include charges for any related professional services, including dispensing and fitting services, unless the advertisement specifically and clearly indicates otherwise. (1 Deering's Business and Professions Code Annotated of the State of California § 651 (1995 Supp.).)

comparison or relativity -- for example, 'low fees' -- must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity." Section 651(c) provides that "[a]ny advertisement which refers to services, or costs for services, and which uses words of comparison must be based on verifiable data substantiating the comparison. Any person so advertising shall be prepared to provide information sufficient to establish the accuracy of that comparison."

The close parallel between the CDA advisory opinions and the statute strongly suggests that the association simply followed the California statutory definition of false and misleading advertising by health professionals. A side-by-side comparison of the language does not suggest that CDA extended or attempted to extend that coverage of the statute.

The substantiation and disclosure requirements in Section 651(b) and (c) of the California statute reflect a concern about misleading advertisements making price comparisons. By issuing guides relating to deceptive price comparisons, the Commission has indicated that the concern is legitimate and that disclosure and substantiation rules are an appropriate way to address the concern. 16 C.F.R. § 233. For example, the Commission requires:

> ". . .whenever a 'free,' '2-for-1,' 'half price sale,' '1-cent sale,' '50% off,' or similar type of offer is made, all the terms and conditions of the offer should be made clear at the outset." (16 C.F.R. § 233.4(c).)

The majority suggests that although the CDA rules on their face may seem "innocuous," CDA enforced the rules in an anticompetitive fashion, Slip Op. at 17, citing a handful of CDA actions to support this conclusion. Some of the CDA actions appear questionable, but the incidents cited are too limited in number to show a pattern of enforcement sufficient to establish a CDA policy to prohibit price advertising. One

of the most questionable CDA actions is Exhibit CX-118, which is a 1993 letter from CDA's Membership Application Review Committee (MARS) to the Tri-County Dental Society, recommending denial of membership to Dr. Buckwalter, because he advertised "Reasonable Fees Quoted in Advance," "No Cost to You," and "Major Savings." Although the MARS letter cited and ostensibly relied on Section 651 of the California Code, no clear parallel to the statute is apparent.

The majority also cites an April 1988 MARS letter that appears to prohibit claims that fees are "reasonable," CX-301, but the majority acknowledges that CDA abandoned this position in 1991. CX 1223-D; Tr. 1453 (Dr. Nakashima).[14] In summary, there is conflicting evidence about claims of "reasonable" or "affordable" fees, but this is hardly a persuasive showing of a pattern of conduct that effectively prohibited fee advertising.[15]

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[14] Some local dental societies may not have gotten word of the 1991 action. See CX-391 (October 19, 1993, letter from the Tri-County Dental Society); CX-778 (May 27, 1993, letter from the Tri-County Dental Society). Abandonment does not moot the case, but it may be relevant in assessing whether the evidence establishes a pattern of conduct.

[15] In footnote 6 at page 10, the majority cites thirteen additional CDA letters related to price advertising. Ten of the letters relate to claims that fees are "affordable." CX-335 (Dr. Dubin 1991); CX-32 (Dr. Bales 1991); CX-514 (Dr. Stygar 1991); CX-866 (Dr. Rosenson); CX-50 (Dr. Jung 1990); CX-602 (Dr. Leizerovitz 1991); CX-772 (Dr. Nguyen 1991); CX-755 (Dr. Moy 1992); CX-957 (Dr. Skinner 1992); and CX-949 (Dr. Singhal 1990). One relates to the use of the word "reasonable." CX-1042 (Dr. Bales 1991). It certainly would be questionable for an association to prohibit all such claims, but the evidence is conflicting, and CDA may prohibit only unsubstantiated claims. A number of CDA ethics officials testified that CDA's Code prohibits only unsubstantiated claims. Tr. 365-66 (Dr. Abrahams testified that the claim is meaningless" and does not violate the Code of Ethics and is "so prevalent that we would spend a lot of time enforcing it . . . ."); Tr. 1347 (Dr. Kinney testified that claims of reasonable or affordable prices are acceptable if verifiable); Tr. 1479 (Dr. Nakashima testified that such a claim is acceptable "if it can be substantiated"); Tr. 1574 (Dr. Cowan); Tr. 1044-45 (Dr. Lee testified that a claim of reasonable or affordable fees is acceptable if verifiable).

The record supports the majority's finding that CDA enforces the disclosure requirements imposed by the California State Board of Dental Examiners.[16] The objective of a disclosure requirement is to place more information in the hands of consumers. A disclosure requirement is not a prohibition on price advertising, although required disclosures may in some circumstances be so extensive and burdensome that price advertising is effectively prohibited. Although the majority hypothesizes about the burden of the state Board's regulation, a witness with broad experience in advertising by California dentists, called by complaint counsel, testified that the disclosure rules did not burden price advertising. Tr. 628, 648-50.

The majority quotes the disclosure requirements as they appear in the 1988 "Advertising Guidelines" issued by the CDA, but without identifying the source of the disclosure requirement. CX-1262. Slip Op. at 17. The disclosure requirements were promulgated by the California Board of Dental Examiners, not CDA. Preceding the disclosure requirements quoted by the majority, CDA's Advertising

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[16] Footnote 6 at page 10 of the majority opinion provides additional examples. CX-18 (Dr. Asher 1993); CX-444 (Dr. Hiatt 1993); CX-387 (Dr. Ghadimi 1992); CX-366 (Dr. Foroosh 1993); CX-333 (Dr. Dorotheo 1993); CX-126 (Dr. Butt 1991); CX-51 (Dr. Beheshti 1991); CX-49 (Dr. Beheshti 1990); CX-27 (Dr. Azarmi 1993); CX-4 (Dr. Aguilera 1990); CX-297 (Dr. Davtian 1991); CX-258 (Dr. Daher); CX-248 (Dr. Crowley); CX-206 (Dr. Choi 1992); CX-151 (Dr. Casteen 1993); CX-516 (Dr. Kachele); CX-514 (Dr. Stygar 1991); CX-497 (Dr. Johnston 1993); CX-474 (Dr. Jeffs 1990); CX-602 (Dr. Leizerovitz 1991); CX-557 (Dr. Kita 1992); CX-668 (Dr. Massa 1992); CX-661 (Dr. Mardirossian 1990); CX-646 (Dr. Maiden 1992); CX-830 (Dr. Paulsen 1990); CX-828 (Dr. Patel 1990); CX-780 (Dr. Norzagaray 1992); CX-775 (Dr. Nicholl 1993); CX-772 (Dr. Nguyen 1991); CX-755 (Dr. Moy 1992); CX-745 (Dr. Moran 1991); CX-1000 (Dr. Stuki 1992); CX-957 (Dr. Skinner 1992); CX-913 (Dr. Schleuniger 1992); CX-865 (Dr. Rosenkranz 1993); CX-856 (Dr. Rocha 1993); CX-855 (Dr. Rocha 1993); CX-843 (Dr. Ramalingam 1993).

Guidelines make this clear by stating that "the Rules and Regulations of the State Board of Dental Examiners require you to list all of the following in your advertisement(s)" and then listing the disclosures quoted at page 17 of the majority opinion. CX-1262-I. The CDA Advertising Guidelines appear accurately to recite Section 1051 of the rules of the California Board of Dental Examiners. 16 Barclays California Code of Regulations § 1051, RX-136-E.

The majority concludes that the disclosures required by the California Board of Dental Examiners stifle discount advertising. The disclosures required by the Board include the nondiscounted fee, the discount in dollars or percentage terms, the duration of the discount offer, and the group that qualifies for the discount, plus any other conditions or restrictions on the offer. CX-1262-I.

The record shows that, as a practical matter, these disclosure requirements do not preclude discount advertising. For example, the Advertising Guidelines illustrate the disclosures required for a discount on a cleaning: $10 off (regularly $25.00) Good through June 1, 1985." CX-1262-I. The disclosures in this illustration do not make the offer unmanageable or ineffective and, indeed, the majority does not articulate a concern about such discount advertising. Rather, the majority is concerned about the possibility that a dentist might want to advertise an across-the-board discount on fees for many or all services. Slip Op. at 18.

The majority relies on the testimony of Dr. Barry Kinney, a member of CDA's Judicial Council, to infer that CDA might require an advertising dentist to include disclosures that would fill two pages in a telephone book. Slip Op. at 18, quoting Tr. 1372. Dr. Kinney testified that if a dentist wanted to offer an across-the-board discount, then "you would have to be a little flexible" and not require disclosure of every fee. Slip Op. at 19, quoting Tr. 1373. Indeed, Dr. Kinney indicated that CDA interpreted the California Board of Dentistry rules to avoid oppressive disclosure requirements. He said that in the event of an across-the-

board discount advertisement, the CDA Judicial Council would verify that the dentist was, in fact, doing what he advertised and that "I don't think that we would hold somebody to these restrictions if in fact they were going to do across-the-board advertising." Tr. 1375.

It is unclear whether CDA has adopted Dr. Kinney's flexible view. The majority finds that CDA insisted on a "full panoply of disclosures," citing several exhibits. For example, Exhibit CX-206-A, a September 3, 1992, letter from CDA's MARS to the San Gabriel Valley Dental Society, recommends denial of a dentist's membership application because her advertisement, "20% off New Patients with this Ad," violated Section 1051 of the rules of the Board of Dental Examiners "by failing to list the dollar amount of the nondiscounted fee for each service."[17] This 1992 letter seems inconsistent with the flexible view of Dr. Kinney. The majority also cites a 1991 instance in which the MARS committee recommended that a dentist be admitted but counseled about advertising a "10% senior citizen discount" without disclosing the nondiscounted fee and the duration of the offer. CX-585-A. Given the testimony of two CDA officials that advertising senior citizen discount would be acceptable, Tr. 872, 1351, it is unclear whether the association's view has changed since 1991. Overall, the evidence appears to be conflicting on the manner in which CDA approaches this Board rule.

The record does not establish that the disclosures required under Section 1051 and derivatively by CDA constituted a prohibition of discount advertising. Indeed, complaint counsel's own witness seriously undercut the theory that CDA's enforcement of Section 1051 of the Board rules suppressed discount advertising. Although Mr. Christensen, whose experience in the market is described above, said in

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17 The record contains little explanation of the factual background or the reasons for the conclusion in the MARS letter. It is unclear whether the 20% discount was for all dental work needed by new patients or just for the initial consultation.

response to hypothetical questions by complaint counsel that excessive disclosures might reduce the effectiveness of a discount advertisement, Tr. 598-600, he testified on cross-examination that as a matter of marketing strategy, his agency recommends that specific discount advertisements be directed to a limited number of people for a limited time and that the ads show the usual and customary charge from which the discount is taken. Tr. 625-26, 648. The disclosures recommended by Mr. Christensen's advertising agency appear to coincide with the disclosures required by the California Board, but his reason for the recommendation was based on the marketplace not the rule. He recommends disclosure because '[w]e don't want to mislead anyone." Tr. 628. Mr. Christensen also recommended against advertisements of across-the-board discounts because an across-the-board discount might be construed as a price reduction, and an insurance company might reduce the "usual and customary rate" to the lower rate for the purposes of reimbursement. Tr. 629.

Mr. Christensen testified that "there is no burden whatsoever" in disclosing the UCR charges (usual and customary rate), an expiration date and the discounted offer price in an advertisement. Tr. 628, 648-50. Mr. Christensen also offered explanations of the relative scarcity of across-the-board discount advertisements in the yellow pages or elsewhere. As to the yellow pages, he said that PacBell generally does not allow across-the-board discount advertisements. Tr. 645. With respect to the marketplace in general, he said that across-the-board discounts "wont' work as a marketing tool." Tr. 645. In his opinion, such advertisements are ineffective and would disappear from the marketplace on their own. Id. Mr. Christensen said that the one situation in which across-the-board advertisements appear to be effective is for senior citizen discounts. Tr. 651. In that situation, he recommends that his clients include a statement saying to call for details regarding the offer. Id. Dr. Kinney testified that senior citizen discount advertisements are acceptable. Tr. 1351. See also Tr. 872 (Dr. Abrahams). In fact, according to Dr. Kinney, the CDA

sponsored a "Senior Dent" program that offered at 15 percent discount to seniors. Id.

I cannot join the opinion of the majority insofar as it concludes that CDA effectively prohibited price advertising for dental services. Rather than extracting sweeping conclusions from the conflicting evidence and testimony, I would remand for findings of fact regarding the restrictions on price advertising imposed by CDA (not local societies). I would require specific findings on whether the disclosure requirements are, in effect, a prohibition on price advertising. If the disclosure requirements impose no real burden on price advertising, as Mr. Christensen testified, I would be unlikely to find that they constitute a prohibition on price advertising. To the extent CDA does not effectively prohibit price advertising, an analysis under the rule of reason should address benefits to consumers, if any, of its requirements for price advertising and the extent to which the disclosures impose a burden on advertisers. Additional factual findings on these issues would be helpful in that analysis.

Under the per se rule, all we need find for liability to attach is that the conduct occurred. On this record, I cannot reach that threshold and ultimate finding of act. The per see rule is a harsh rule. The Commission would be well advised not only to exercise caution in extending the rule to new forms of conduct, but also to exercise a high degree of care to apply the rule only when the subject conduct has been well established to have occurred.

2. Alleged Restraints on Nonprice Advertising

With respect to restrictions on nonprice advertising, I agree with the majority that CDA's actions must be evaluated under the rule of reason, which requires a showing of anticompetitive effects. Applying the rule of reason, I find no liability, even assuming that CDA does restrain nonprice advertising. An analysis of the evidence, however, puts even that assumption in question.

The basic CDA prohibition on nonprice as on price advertising is against false and misleading advertising, and again CDA relies on California statutes to define what is false and misleading. Although a pattern of enforcement actions might demonstrate that an association has twisted a legitimate rule to anticompetitive purposes, the examples cited by the majority are not sufficient to show such a pattern.

The majority asserts that CDA proscribes a "vast" range of nonprice advertising, Slip Op. at 25, but does not support this conclusion with a vast array of evidence. As we saw earlier, the restriction on advertising appears to be Section 10 of the CDA Code of Ethics, which on its face prohibits only false and deceptive advertising. The issue is whether CDA applied the facially valid rule in such a way as to stifle truthful and nondeceptive advertising.

Testimony by CDA officials is consistent with the goal of discouraging deception.[18] According to Dr. Kinney, a member of the CDA Judicial Council, the council "look[s] at the total ad, and attempt[s] to determine whether the ad in its entirety would be misleading to a prudent person or not." Tr. 1335, 1339. In doing so, he said: "We rely on the state's Dental Practice Act, the Business & Professions Code to help us determine whether or not the ad is misleading in any material respect." Id. A second CDA official, Dr. Nakashima, provided a similar account of CDA's enforcement standards. He also said that CDA's Judicial Council "look[s] at the whole ad in its entirety" to make a determination whether it is "false and misleading in any material respect." Tr. 1444. He also said that the organization relies on state law for guidance in determining whether an ad is false or misleading and confirmed that Section 1051 of the California Code of Regulations and Sections 651 and 1680 of the California Business and

[18] Their testimony also is consistent with the Commission's policy on deception. See Commission Policy Statement on Deception, Cliffdale Associates, Inc., 103 F.T.C. 110 (1984) (Appendix, at 176).

Professions Code were the state laws on which it relied. Tr. 1447.

It is not clear how the majority reconciles this testimony with its conclusion that "[t]he nonprice advertising CDA proscribes is vast." Slip Op. at 25. Before leaping to such a conclusion, the Commission should make at least minimal findings of fact regarding the scope of the advertising prohibitions imposed by CDA (as distinguished from the component societies, which were not charged in the complaint, and with appropriate reference to the basis in state law for any such restrictions).

The majority cites Advisory Opinion 8 to Section 10 of CDA's Code of Ethics, which provides:

> Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect.[19] (Emphasis added.) (CX 1484-Z-49.)

The majority does not parse the language of the advisory opinion, but asserts that "[i]n practice, CDA prohibits all quality claims." Slip Op. at 25. It cites a 1992 letter from MARS to the Orange County Dental Society, in which the committee recommended denial of an application for membership in part because of the use of the words "quality dentistry." CX 387-C. As with many of the letters from MARS regarding an application, the factual background is not fully explained. For example, it is unclear whether the dentist in question had an opportunity to provide information

[19] Section 1052 of the Regulations issued by the California Board of Dental Examiners provides:

> Any advertisement must be capable of substantiation, particularly that the services offered are actually delivered and at the fees advertised. RX 136-E.

to substantiate the claim.[20] If the dentist was given the opportunity to substantiate the claims but was unable to do so, the action might be seen in a different light. Unexplained, this decision is subject to serious question.

The majority cites two other MARS letters discussing the definition of falsity in Advisory Opinion 2(c) of the CDA Code and Section 651(b)(3) of the California Code (defining as false a statement that "[i]s intended or is likely to create false or unjustified expectations of favorable results"). RX-138A. In a 1992 letter to the Southern Alameda County Dental Society, MARS stated that the advertising claim that "[w]e are dedicated to maintaining the highest quality of endodontic care . . . ." appeared to be inconsistent with Section 2(c). CX-1083-C. Similarly, in a letter to the San Francisco Dental Society, MARS said that the claims "improved results with the latest techniques" and "latest in cosmetic dentistry" were inconsistent with 2(c) and unverifiable. CX-306-C.[21] It is not clear whether the dentists in question were given the opportunity to substantiate the claims. For example, the claim of "improved results with the latest techniques" might be proved with statistical evidence. If such a claim were made by a dentist without such evidence, the advertisement might well be

[20] The reference to "quality dentistry" is one of several claims discussed in the MARS letter, and it appears that the committee's action was based partly on a finding that the dentist in question advertised that she was a member of the ADA when she was not. CX 387-B.

[21] In footnote 6 at page 10, the majority cites four other CDA actions based on this provision, all of which raise the same substantiation questions. Indeed, one of the letters is much like a Commission deceptive advertising decision, and it demonstrates that preventing unsubstantiated, indeed, in this case, false claims was precisely CDA' s concern. Exhibit CX-478, cited by the majority, reflects a decision of the CDA Judicial Council that the claim "laser dentistry is revolutionizing dental care" was false because "laser dentistry is not revolutionary" and created unjustified expectations. See also CX-932 (claim of "the latest techniques"); CX-115 (claim of "lots of" experience); CX-963 (claim of "highest infection control standards").

deceptive. Unexplained, these two letters are open to serious question.[22]

The majority also concludes that CDA suppresses claims of superiority or guarantees. Slip Op. at 26. The majority does not address the role of the state legislator of California in prohibiting such claims. Slip Op. at 26. Section 1680(i) of the California code defines "unprofessional conduct" by a person holding a dental license to include the following:

> The advertising of either professional superiority or the advertising of performance of professional services in a superior manner. This subdivision shall not prohibit advertising permitted by subdivision (h) of Section 651.

CDA has interpreted this statutory ban on claims of professional superiority to prohibit advertising implying that a dentist practices superior sterilization practices. See CX-671-A (claim that "all of our handpieces (drills) are individually autoclaved for each and every patient" said to violate Section 1680); CX-43-B (claim of "state-of-art

[22] In footnote 25 at page 36, the majority suggests that my interest in further factual inquiry is misplaced, citing six examples to show that "MARS was not concerned with any surrounding circumstances" when it wrote to the individuals. The record as a whole contains enough evidence of CDA's concern with surrounding circumstances to justify further factual inquiry. I do not quarrel with the evidence the majority cites, only with their failure to weigh explanatory and probative conflicting testimony and with their failure to consider the possible benefits of CDA' s conduct. I have identified a number of such instances, observing, for example, in the discussion below that an implied claim of more effective sterilization may be deceptive. See, e.g., CX-394 (claim of "highest standards in sterilization"); CX-780 (claim of "modern sterilization"); and CX-557 (claim that "we guarantee all dental work for 1 year"). Common sense and the Commission's policy regarding deceptive advertising provide a basis for anticipating that these particular interpretations may prove to be justified. Because such claims account for a significant number of CDA enforcement actions, further inquiry would not be out of line. Indeed, it appears to be the more responsible course of action.

sterilization" said to violate Section 1680).[23] Enforcement of a prohibition against truthful superiority claims certainly can pose competitive dangers, because comparison among competitors is well recognized as a useful function of advertising.[24] It is possible, perhaps even likely, that these CDA letters crossed the line, but it would be useful to explore the issue somewhat further before condemning CDA.

For example, a claim that a dentist sterilizes drills for each patient may be literally true, but it also may imply a claimed distinction from other dentists (i.e., other dentists do not do so).[25] If all dentists routinely sterilize their drills between patients, as one might hope, such an implied claim might be deceptive. Similarly, the "state of the art sterilization" claim might be read to imply that other dentists use ineffective or less effective sterilization techniques, and that may not be true.[26] A review of some of the Commission's own deceptive advertising cases reveals that these interpretations

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[23] In footnote 6 at page 10, the majority note a number of additional claims of the same sort. See CX-394 (Dr. Go, 1993); CX-360 (Foroosh 1986); CX-43 (Dr. Baron 1993); CX-780 (Dr. Norzagaray 1992); CX-718 (Mickiewicz and Rye, 1992); CX-1026 (Dr. Tracy 1992): CX-605 (Dr. Lerian 1993).

[24] See FTC Statement of Policy in Regard to Comparative Advertising, FTC News Summary No. 38 (August 3, 1979) ("Comparative advertising encourages product improvement and innovation, and can lead to lower price in the marketplace.").

[25] The Commission has held that truthful statements regarding the attributes of a product or the nature of services may convey implied claims. See Commission Policy Statement on Deception, Cliffdale Associates, Inc., 103 F.T.C. 110 (1984) (Appendix, at 176).

[26] Similar interpretations appear in Commission cases. For example, the Commission has alleged that implied superiority claims were made for hearing aids that were advertised as incorporating technological advance. United States v. Dahlberg, Civ. No. 4-94-CV-165 (D. Minn. Nov. 14, 1995) (consent decree); United States v. Beltone Electronics Corporation, Civ. No. 94-C-7561 (N.D. Ill. Dec. 21, 1994) (consent decree).

are not far-fetched.[27] It might be useful to explore the issues in greater depth.

Section 1680(1) of the California Code defines unprofessional conduct by dentists to include the following:

> The advertising to guarantee any dental service, or to perform any dental operation painlessly. This subdivision shall not prohibit advertising permitted by Section 651.[28]

CDA has enforced this statutory prohibition against guarantees. See CX-668-C and CX-557-C (claim that "we guarantee all dental work for 1 year" said to violate Section 1680(1)); CX-497-C (claim of "crowns and bridges that last" said to imply guarantee in violation of Section 1680(1)). The claim that "[w]e guarantee all dental work for 1 year" appears to violate Section 1680(1) of the Dental Practice Act, which defines "unprofessional conduct" to include " the advertising to guarantee any dental service." CX-668. It is not clear whether the claim was a money-back offer if the dental work failed within one year, which might be true, or whether the claim was that all dental work will be perfect for at least one year, which seems unlikely. If the claim is limited to a money-back offer, then prohibiting such advertising may be anticompetitive. The majority does not

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[27] The Commission has found or alleged in a variety of contexts that express and truthful claims have conveyed implied claims of superiority and that some of these implied claims were deceptive. See e.g., Kraft, Inc., 114 F.T.C. 40, 121, 128-32 (1991), aff'd sub nom., Kraft, Inc. v. FTC, 970 F.2d 311 (7th Cir. 1992); Bristol-Myers Co., 102 F.T.C. 21, 328-48 (1983), aff'd sub nom., Bristol-Myers Co. v. FTC, 738 F.2d 554(2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985); see also, e.g., United States v. Egghands Best, Inc., (E.D. Pa. Mar. 12, 1996) (consent decree); Archer-Daniels-Midland, Docket C-3492 (Apr. 20, 1994) (final decision and order).

[28] Someone more flippant than I might suggest that prohibiting claims of painless dental operation is clearly justified because such claims are so obviously deceptive. To its credit, the majority does not challenge this provision.

discuss whether there might be a reason to require disclosure of the nature or terms of the guarantee.

The majority suggests that CDA has restricted advertising claims such as an offer of "gentle" care, although its restriction may be less sweeping than those of local societies. CDA witnesses said that CDA does not restrict claims such as "gentle" dentistry. Tr. 1343-46 (Dr. Kinney, member of CDA Judicial Council). Indeed, in 1993, CDA advised the local societies that the state Board regarded "gentle" as acceptable advertising. Tr. 1466 (Mr. Nakashima); RX-56. Because local societies were not charged in the complaint and because their conduct cannot be attributed to CDA, the reliance by the Administrative Law Judge and by the Majority on those actions is misplaced.

Finally, the majority finds that in 1984, CDA adopted a resolution that "solicitation of school children on any private or public school ground(s) is deemed not to elevate the esteem of the dental profession." CX 1115-A. My initial reaction to the CDA resolution is to question whether it expresses a point of view over which the majority really wants to quibble.[29] Second, in adopting the resolution, CDA cited and relied on Section 51520 of the California Education Code, which prohibits teachers or others from soliciting contribution from school children for organizations not under the school's control.[30] Perhaps CDA has enforced the

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[29] Even assuming the resolution refers only to solicitation of dental business, to join the majority's implicit endorsement of such behavior would not be a decision I would like to explain to my mother.

[30] Section 51520 provides:

> During school hours, and within one hour before the time of opening and within one hour after the time of closing of school, pupils of the public school shall not be solicited on school premises by teachers or others to subscribe or contribute to the funds of, to become members of, or to work for, any organization not directly under the control of the school authorities,

resolution in a manner that is overly broad, but the evidence to that effect is also thin.

After considering the evidence, I cannot join the majority's broad characterizations of CDA' s actions. CDA's Code of Ethics on its face prohibits only false and deceptive advertising, and the case turns on how CDA has applied this legitimate principle. In evaluating CDA's actions, I would explore more fully the benefits to consumers, if any, of each of CDA's requirements and weigh the countervailing burden on advertisers. In turn, I do not offer a blanket endorsement of CDA's actions, the competitive effects of which merit examination, but rather suggest that the analysis of those actions should be based on a recognition that prevention of deceptive advertising may benefit consumers.

III.

CDA's restrictions on advertising appear to be parallel to and no broader than restrictions imposed by the California legislature by statute. The majority does not compare CDA's actions to the state code nor does it suggest that CDA attempted to expand the statutory definitions. Instead, the majority suggests that because CDA did not "seriously attempt" to ascertain the California Board of Dentistry's interpretation of the "proper scope of state law," CDA lacks a basis for understanding state law and cannot claim that CDA is "furthering the State's current policy choice." Slip Op. at 46. To the extent that a statute or regulation is clear on its face, concern about dubious or incorrect interpretations seems misplaced. The majority does not identify any lack of clarity in the state law, nor can I. Any suggestion that CDA acted inconsistently with the state laws also is unsupported. CDA frequently relied on the plain language of state statutes and regulations in its enforcement actions, and CDA officials

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> [excluding charitable organizations approved by the school board] . . . .

testified that the association modified its code of ethics to maintain consistency with state law.[31]

The majority speculates that the Board may not be enforcing its rules because of concern about a 1989 memorandum prepared by a supervising attorney in the Legal Services Unit of the California Department of Consumer Affairs and discusses that memorandum at considerable length. Slip Op. at 43-44. This inference is highly questionable given that the California state legislature amended Section 651 of the California Code (quoted in part in footnote 4 above) in 1990 and again in 1992. If the legislators had wanted to adopt the contents of the memorandum, they had the opportunity and apparently did not choose to do so.

The majority's speculation that the Board of Dental Examiners has decided not to enforce its regulations is undercut by evidence from the Board itself. Specifically, in 1992, the state Board prohibited the use of the word "gentle" in advertising, RX-54-A, until the CDA persuaded it that such advertising was appropriate. RX-55. In acknowledging the change to CDA, the state Board of Dental Examiners attached a document summarizing its enforcement position on several issues, revised as of March 8, 1993. RX-56A, B. That 1993 summary does not support the view of the majority that the 1989 memorandum caused the Board of Dental Examiners to refrain from enforcement. In addition, Dr. Nakashima testified that he called Dr. Yuen, the president of the California State Board of Dental Examiners, the night before his testimony and confirmed that the Board considers its rules to be valid and enforceable, but that it operates under tight budgetary constraints. Tr. 1468-69. Of course, this is hearsay, but no objection was made to Dr. Nakashima's testimony, which appears on point and

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[31] According to the testimony of Dr. Abrahams, who served on CDA's Judicial Council, the CDA amended its code of ethics frequently to keep it consistent with the state dental practice act. Tr. 851.

probative. Nor did complaint counsel introduce testimony or other evidence contradicting the hearsay.

I agree with the majority that CDA is not protected by the state action doctrine. Quite apart from the state action doctrine, however, a factual question arises that deserves at least to be addressed regarding what effect CDA actions, as distinct from state law, had on competition in the market for dental services. The majority states that in the absence of state enforcement of state statutes, it was "CDA, not California, that tampered with the workings of the market for dental services." Slip Op. at 46.[32]

The record, however, does not establish that CDA, as opposed to the state of California, influenced the advertising of dentists. Some dentists who advertised were told by CDA that their advertisements violated state law. The record simply does not reflect whether those dentists changed their advertising and, if so, whether it was because they did not want to offend CDA or because they did not want to violate state law.

State laws may have had an in terrorem effect even in the absence of vigorous state enforcement. Section 652 of the California Code provides that violations are punishable by revocation of the violator's professional license by the relevant licensing board, and Section 652.5 provides that any violation is a misdemeanor and is punishable by "imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars

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[32] The Commission cites Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc., 17 F.3d 295 (9th Cir.), cert. denied, 115 S.Ct. 66 (1994). In that case, the court found that the only anticompetitive injuries resulted from government action and hence that a private party could not be held liable. That factual conclusion on causation of injury does nothing to establish that CDA was the source of the advertising restriction here. The second case the Commission cites, Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612 (6th Cir. 1982), held that the actions of a state dental board were protected by the state action doctrine. Again, that holding provides little insight into the resolution of this case.

($2,500), or by both the imprisonment and fine." 1 Deerings California code § 652.6 (1995 Supp.). A 1994 amendment makes clear that punishment can include both imprisonment and fine, which suggests that this was not some long forgotten law. Id.

Respect for the law and a willingness to conduct oneself in accordance with the law can be powerful incentives regardless of the resources devoted to law enforcement. in the absence of evidence regarding the relative impact of state law versus CDA, it seems questionable to infer that dentists feared the CDA instead of the state of California.

Arguably, the majority could find liability under Section 5 of the FTC Act based on conclusions that the California law has anticompetitive effects and that CDA had encouraged compliance with California law, without finding that CDA's conduct alone had anticompetitive effects. The majority has not so held or even suggested such a theory of liability. In view of the absence in the record of evidence showing adverse effects on competition, I do not address the merits of such a theory either.

IV.

Even assuming that the preponderance of the evidence establishes that CDA engaged in each and every variation of an advertising restraint analyzed under the rule of reason and that each such restraint is unjustified, I still would dissent from the opinion of the majority because of the even greater weaknesses in the remaining elements of the case. The Commission reverses the finding of the Administrative Law Judge that CDA has no market power and concludes instead that CDA has market power. The fundamental difficulty with this conclusion is that it is not supported by evidence. Complaint counsel made no effort to try the case on a rule of reason theory and did not introduce testimony or documents to establish the elements of a rule of reason case. To put the matter in perspective, complaint counsel proposed 949 findings of fact and conclusions of law with respect to this

proceeding, but they proposed only one finding, Proposed Finding 570, relating to market power.[33] The Administrative Law Judge correctly rejected this proposed finding. I agree with the finding of the Administrative Law Judge that CDA lacks market power.[34]

Complaint counsel's Proposed Finding 570 ("CDA has market power") is based entirely on the testimony of Dr. Knox, CDA's expert economist. According to Proposed Finding 570, because CDA members as a group face a downward sloping demand curve for dental services and assuming hypothetically that CDA members act together, they could exercise some degree of market power.[35] Complaint counsel's hypothetical does not suffice to rebut Dr. Knox's economic testimony that CDA's enforcement of its Code of Ethics "has no impact on competition in any dental market in California." Tr. 1633.

The ALJ found that dental patients are relatively price sensitive because patients pay for their own care, and most dental care is not urgent. IDF 321. To demonstrate that

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[33] Complaint Counsel's Proposed findings 540 to 578 purport to set forth Complaint Counsel's full economic analysis of the case.

[34] The conclusion of the Administrative Law Judge that CDA lacks market power rests on the finding that there are no barriers to entry. ID at 76. The Administrative Law Judge also concluded that complaint counsel failed to introduce evidence sufficient to show that CDA members could act together to raise prices or reduce output and failed to introduce evidence of relevant geographic markets. ID at 76.

[35] Dr. Knox testified that market power is the ability to raise prices above the competitive level. Tr. 1689. He suggested that with a downward sloping demand curve, by definition, a group of suppliers with market power could raise prices above a competitive level. Tr. 1690. Complaint counsel elicited from him the statement that dentists individually and collectively face a downward sloping demand curve. Tr. 1691. In response to a hypothetical question by complaint counsel, he said that assuming that CDA members collectively raised the price of their services, the total quantity of services provided by CDA members would decline. Tr. 1694.

CDA members profitably could impose a price increase, it would be necessary to show that other dentists could not increase their output and that new dentists could not enter in sufficient numbers to defeat such a price increase. Complaint counsel made no such showing, and the proposed finding was correctly rejected.

To establish market power, relevant antitrust product and geographic markets must be identified. Respondent's expert economist, Dr. Knox, testified that dental services could constitute a relevant product market. Tr. 1689. The majority adopts the dental services product market and defines dental services as those services provided by dentists licensed under the California Code. Slip Op. at 31. I agree that the relevant product market appears to be the provision of dental services.

The record provides relatively little information on the relevant geographic market(s) for dental services in California. Some evidence suggests that the relevant geographic markets are local. Respondent's expert, Dr. Knox, testified that in his opinion, the entire state is not a market and that the relevant markets are smaller than the state. Tr. 1642. Mr. Christensen, whose experience in the California dental advertising market is discussed above, said that a single dental practice draws from the closest 20,000 or 30,000 households. Tr. 655. In his view, people do not travel far to visit a dentist. Tr. 637.

Although the record suggests that the relevant geographic markets are smaller than the state, no specific geographic markets were urged by complaint counsel, and none is adopted or discussed in the majority opinion. The record evidence suggests that individual dentists draw most of their patients from the area immediately surrounding their offices, but that does not conclusively establish the size of the relevant geographic markets. For example, in urban areas, the practice areas of some dentists may overlap with those of other dentists, which in turn overlap with still others. In this fashion, small competitive zones may be linked into a larger

geographic market. These geographic market issues, however, were not developed in the record.

The majority says that over 90 percent of the dentists "in at lease one region" are members of CDA, citing CX-1433. Slip Op. at 31. Let us consider this single piece of evidence about a single possible geographic market. Exhibit CX-1433 is a letter not from CDA but rather from the executive secretary of the Mid-Peninsula Dental Society, which includes the California cities of Menlo Park, Palo Alto, Portola Valley, Los Altos and Mountain View. The letter, which appears to be a form letter with which to send out membership applications, says nothing about whether the dentists in the region compete with one another. Nothing in the record establishes the author's expertise in defining competitive markets, and nothing in the letter suggests that the area covered by the Mid-Peninsula Dental Society is a relevant antitrust market. In sum, although dental services appears to be a product market, there is no basis in the record for defining any geographic area as a relevant market. Complaint counsel's failure to prove a relevant antitrust market alone is sufficient to dispose of the allegations of market power.[36] See Adventist Health System/West, 5 Trade Reg. Rep. (CCH) ¶ 23, 591 (April 1, 1994); Capital Imaging Associates v. Mohawk Valley Medical Ass'n, 996 F.2d 537, 547 (2d Cir.), cert. denied, 114 S.Ct. 388 (1993) (defining local radiology market in rule of reason analysis).

The majority concludes that "where there are significant barriers to entry," market share alone may be relied on as an indicator of market power. Slip Op. at 31. Since no geographic markets have been defined, it is not possible to

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[36] It is even more elementary that once a market has been established, some conduct affecting competition in that market must be identified before liability can attach. Even assuming that the evidence is sufficient to show that the area served by the Mid-Peninsula Dental Society is a relevant geographic market, none of the alleged restraints on nonprice advertising discussed in the opinion of the majority (Slip Op. at 25-27) was directed to dentists in this area.

develop any market share data or other pertinent concentration statistics. Nonetheless, I agree with the general proposition that the presence or absence of impediments or barriers to entry is important to, and may be dispositive of, the competitive analysis. See, e.g., United States v. Baker Hughes, Inc., 908 F.2d 981, 987 (D.C. Cir. 1990); United States v. Waste Management, Inc., 743 F.2d 976, 983 (2d Cir. 1984); United States v. Gillette Co., 828 F. Supp. 78 (D.D.C. 1993).

Dr. Knox, the respondent's economic expert, testified that the basis for his opinion that CDA's enforcement activities have no impact on competition in any dental market in California is that "CDA cannot erect any barrier to entry to any dental market in the state of California." Tr. 1633-34. He said that in his view, the only barrier to entry in this market is the need to acquire a license issued by the California Board of Dental Examiners. Tr. 1634. In his opinion, the facts that a dentist must attend dental school to sit for the exam or that he or she must acquire or lease an office and equipment do no amount to entry barriers. Tr. 1636-40.[37] The Administrative Law Judge adopted Dr. Knox's view that there are no barriers to entry in the provision of dental services in California.[38] ID at 76.

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[37] A dentist opening a practice must buy equipment, and Dr. Hamann pointed out that it is possible to equip and operatory with used equipment for as little as $2500. A dental school graduate with access to significant capital; such as Dr. Hamann, may purchase two established practices at the start of a career, but nothing in the record suggests that every graduate needs to take that high-cost approach to entry. Used equipment or rental equipment is available. Office space can be leased.

[38] The majority criticizes the Administrative Law Judge for his finding that there are no "insurmountable" barriers to entry in dental services. Slop Op. at 31-32. Although the rhetorical flourish of the Administrative Law Judge is an overstatement of the elements necessary for liability, the Initial Decision does not appear to state or rely on a novel entry standard. Rather, it appears appropriately to focus on whether CDA dentists profitably could raise prices without attracting new entry.

The majority concludes that entry into the California dental market is difficult. Slip Op. at 32. The majority finds that "it can take 18 months to 2 years for a practice to meet current expenses, and between 5 and 10 years to amortize the debt." Slip Op. at 32. Contrary to the inference drawn by the majority, these findings suggest that entry into a California dental services market is possible because lenders are ready, willing and able to extend the credit needed to enter.[39]

A dentist who enters the market has an impact on competition when he or she starts serving patients, not when current expenses are met and not when debt has been amortized. Indeed, if the majority intends to set a new standard to this effect for evaluating the difficulty of entry, we can expect some radical changes in enforcement. Nor does a dentist need to open a separate practice to enter the market. A new graduate from dental school who works as an associate in an established practice contributes to the output of dental services and has entered the relevant market.

The majority cites the testimony of three dentists (Dr. Harder, Dr. Miley, and Dr. Hamann) to support its finding that entry is difficult. Slip Op. at 32. Dr. Richard Harder, a witness called by complaint counsel, said that the first step in establishing a new practice is to identify a suitable area in which to practice and that an entrant then needs to lease or buy equipment. Tr. 297-98. He said that a dental equipment supplier "was helpful in teaching me some of the ropes" and that the cost to equip an office was $15,000. Tr. 297-99. He estimated that it takes at least 18 months to break even. Tr. 300. Dr. John Miley, another witness called by complaint counsel, thought that entry was difficult because in his opinion the state was "over supplied with dentists." Tr. 329. He said that many young dentists graduate from school with debts of $50,000 to $100,000 and that it costs an

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[39] The record contains testimony that it is less expensive to enter the dental services market than to buy a franchise hamburger restaurant. Tr. 1234-35.

additional $50,000 to $75,000 to establish a practice. Tr. 330-331. A third witness called by complaint counsel, Dr. Hamann, testified that he and his wife borrowed $400,000 for her to acquire two established dental practices and to provide the "working capital" to operate them. Tr. 760. He testified that he acquired used dental equipment to furnish six operatories for the practice, at a cost of $2500 to $4000 per operatory (although new equipment might cost $15,000 to $20,000 per operatory). Tr. 761.

Drs. Harder, Miley and Hamann all testified that they (or in Dr. Hamann's case, his wife) successfully entered the California dental services market. Their experiences suggest that entry is not difficult. None of the three witnesses provided even one anecdote about a licensed dentist who wanted to practice in California but was deterred by the difficulty of entry.

Dr. Hamann's testimony indicates that entry is not only possible, but also that it can be highly lucrative. Dr. Hamann is a physician who managed the practice for his wife, Dr. Hamann, who is a dentist. After purchasing two dental practices for about $400,000, they undertook an "aggressive" marketing program. Tr. 806. Although Dr. Hamann did not use price or comparative advertising in her practice, her husband said that her marketing campaign was the "[m]ost aggressive I've ever seen." Tr. 790. The Hamanns sold the practice after eight years, by which time it was earning $1,500,000 per year in gross revenues. Tr. 808. Dr. Hamann testified that after the fifth and sixth year, his wife was earning from $300,00 to $500,000 in profits after paying him $100,000 per year to manage the practice. Tr. 808. It should be observed that marketing success story apparently was achieved well within the bounds of CDA's rules. Dr. Hamann was an active member of the CDA and the Tri-County Dental Society and served as a delegate to the CDA. Tr. 765-66.

Dr. Harder graduated from dental school in 1979 and worked as an associate dentist for Dr. Senise in Glendora,

California. Tr. 245. Because of the long commute, he left that practice in 1981 to establish his own practice in Laguna Hills. Tr. 247. In 1986, he stopped practicing in Laguna Hills and opened an office in Irvine, California. Tr. 250. Dr. Harder's success in opening and subsequently moving a practice provides evidence that the cost of opening an office is not a barrier to entry.

Dr. Miley's concern was that students graduate from dental school with debts. That alone does not prevent entry. If anything, the availability of credit to dental students suggests that a steady flow of new entrants into the profession will continue. Dr. Miley's testimony that California is oversupplied with dentists supports the conclusion that the cost of education has not choked off the flow of potential entrants. If anything, it supports the view that entry is easy. No doubt, entry into the dental services market takes talent, hard work and perseverance. But that is not the kind of difficulty cognizable in an antitrust analysis.

The majority suggests that there is "little doubt" that CDA can enforce its rules because advertising is observable and because dentists place a high value on CDA membership. Slip Op. at 30. The majority states that there is no need to "quantify this benefit econometrically," because when face with the choice of membership or advertising, dentists "overwhelmingly chose the former." Slip Op. at 30.

Econometrics is not necessary to establish anticompetitive effects; simple evidence would do. The majority's rhetoric glosses over the absence of evidence concerning the actual competitive effect of CDA's activities. The phrasing of the choice as one between membership and advertising assumes, without supporting evidence, that dentists in California, including members of CDA, do not advertise. It further assumes, again without benefit of evidence, that the cause of any reluctance to advertise is CDA. The testimony of Dr. Hamann that his wife undertook the "most aggressive" marketing campaign that he had ever seen, while remaining a member in good standing of CDA, and the testimony of Mr.

Christensen about advertising by clients of his advertising agency raise a question whether dentists do face a choice between advertising and membership. The hypothesis that some or even many dentists do not advertise, even if true, does not establish a link between lack of advertising and membership in CDA.[40]

CDA membership is not essential to a successful dental practice in California. CDA offers benefits to its members, but those benefits are readily available from other sources. The Initial Decision identifies CDA's two annual scientific sessions as the "most visible and tangible membership benefit." IDF 101. These sessions are a convenient way for dentists to satisfy their state-imposed continuing education requirement. IDF 105. CDA members attend for free; nonmembers must pay a registration fee to attend. IDF 104. Continuing education also is available from other sources. Tr. 803. CDA members receive CDA publications at a lower subscription rate than nonmembers. IDF. 107.

CDA lobbies the California legislature. IDF 70-85. To the extent that CDA lobbies the state successfully on behalf of dentists, the benefits apparently would flow to members and nonmembers alike. Some other benefits of CDA membership include a marketing program to enhance the image of CDA and dentists, a program promoting direct reimbursement instead of insurance company plans, twice-a-year seminars on the non-clinical aspects of dental practice, and a peer review program as an alternative to litigation to resolve customer complaints. IDF 106, 89, 92, 98.

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[40] The majority responds to my questioning on this point with more citations to CDA documents. See Slip Op. 30 n.21. Even if a dentist agrees to comply with a letter suggesting that an advertisement violates state law, the CDA documents do not show what motivated the change of heart. For that, we must look to documents or testimony from the dentist. The majority cites one such letter. Exhibit CX-480 is a letter from Dr. Jenkins agreeing to change an advertisement that the CDA Judicial Council found to be misleading, stating his disagreement with that position. The letter does not illuminate why he decided to comply.

CDA operates several for-profit subsidiaries. One subsidiary offers professional liability insurance to CDA members. IDF 109. Another for-profit subsidiary is an insurance broker for CDA members and offers CDA members a revolving line of credit, financing for dental office equipment, discounts on long distance telephone rates, a VISA gold card and so forth. IDF 117. Dr. Martin Craven, a past president of CDA, testified that the primary benefit of association membership was social, not financial. Tr. 1200. He testified that other insurance companies offer professional malpractice insurance at lower rates than CDA's subsidiary. Tr. 1401.

It is one thing to conclude that CDA offers its members some benefits (presumable no one joins unless value is perceived), but it is quite another to conclude that CDA membership is so valuable that the association has a "stranglehold on the profession," as the majority suggests. Slip Op. at 30. The benefits that CDA offers to its members are significant enough to persuade them to pay their dues and perhaps to participate in the association's activities. None of the benefits offered by CDA appears to be uniquely available from the association, and none appears to be essential to the successful practice of dentistry. One telling point about the commercial importance of CDA membership is how infrequently it is used in dentists' advertisements. The CDA filed a one and one-half inch thick appendix of dentists' ads in the yellow pages, very few of which announce CDA membership.

The evidence does not support the conclusion that CDA can control the price and output of dental services in California. The majority relies on the single fact that approximately 75 percent of California dentists are members of CDA to support its finding of market power. Almost certainly, the state of California is not a relevant geographic market for dental services. But even hypothesizing a relevant geographic market with membership similar to that statewide, entry could undercut any claimed ability to

exercise market power, and the evidence suggests that entry is, in fact, easy.

The weakness of the majority's anticompetitive effects story is reflected in the majority's final observation that it is "implausible at best" that dentists would move to California to advertise. Slip Op. at 32. If CDA has successfully restrained competition in California by limiting advertising, why would not the usual economic incentives of the free market work in this market? If CDA had successfully controlled its members to halt advertising, why would not the other 25 percent of dentists in California who are not CDA members expand their practices by advertising, and why would not newly licensed dentists or dentists from other areas step in to take advantage of the fact that CDA members had voluntarily tied their own hands in competition to attract patients? The Commission finds it "implausible at best" that this would happen. A better conclusion is that it is "implausible at best" that CDA has had any significant adverse effect on competition.

The opinion of the majority has troubling implications that go well beyond this case. The first of these is its use of the per se rule. There is good reason to apply the per se rule more sparingly than the majority has in this case. Although I would apply the per se rule to prohibitions on price advertising, I would evaluate under the rule of reason disclosure and substantiation requirements for price as well as nonprice advertising to ascertain whether those requirements are reasonable efforts to cure deception. The majority's failure seriously to attend to the possible justifications for CDA's requirements may operate to the detriment of consumers. As recognized in the analytical approach embodied in the Commission's late opinion in Mass. Board, consideration of efficiencies is vital to good antitrust analysis. The per se rule, which dispenses with consideration of efficiencies, should be circumscribed accordingly.

Even assuming that CDA's advertising policies are broader or more burdensome than necessary to prevent deceptive advertising, the majority's rule of reason analysis is troubling. The startling failure to identify a geographic market before finding liability is one cause for concern. The majority's treatment of the entry issue is another. The case can be disposed on ease of entry alone. Not only is the evidence offered to suggest barriers to entry minute, but more importantly, the analysis the majority employs implicitly suggests the adoption of a new standard for evaluating barriers to entry. Unless the analysis of entry in this case is treated as an aberration, we reasonably can assume that the majority would find barriers to entry in almost any market we might imagine. It seems unlikely that the majority would apply the same loose test to barriers to entry in all cases, including merger cases under Section 7 of the Clayton Act, but only time will tell.

I dissent.

OPINION OF COMMISSIONER ROSCOE B. STAREK, III, CONCURRING IN PART AND DISSENTING IN PART

In the Matter of

CALIFORNIA DENTAL ASSOCIATION
Docket No. 9259

I concur in the Commission's determination that respondent California Dental Association ("respondent" or "CDA") has violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, by promulgating and enforcing restrictions on truthful, nondeceptive advertising by its members. I concur as well in the Commission's findings that (1) CDA is subject to FTC jurisdiction; (2) CDA's adoption and enforcement of its policies restricting advertising by its members constitutes an agreement among competitors; (3) CDA's "state law" defense must be rejected; and (4) the Order appended to the majority opinion provides an appropriate remedy for

respondent's unlawful acts. Despite my conclusion that CDA's restrictions on both price and non-price advertising unreasonably restrain trade, I cannot join in the majority's startling decision to extend *per se* treatment to all agreements among competitors to restrain truthful, nondeceptive price advertising. Finally, what the majority styles as its "quick look" rule of reason approach to CDA's restraints on both price and non-price advertising[1] contains unnecessary and potentially confusing departures from the analytical structure set forth in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988) ("*Mass. Board*").

Instead of applying the framework established in *Mass. Board* for the systematic review of all horizontal restraints, the majority applies to CDA's price advertising restrictions a *per se* analysis, somewhat euphemistically labeling it "traditional."[2] Although the Supreme Court and the Commission have generally moved away from summary *per se* condemnation of horizontal restraints without some consideration of potentially relevant rule of reason factors,[3] my colleagues today breathe new life into the rigid and often overinclusive application of the *per se* rule. *Mass. Board* analysis, which faithfully synthesizes and applies the Court's post-*BMI* horizontal restraints jurisprudence, has been bypassed and marginalized so that even the most truncated consideration of relevant market conditions and potential competitive benefits of agreements restricting price advertising need never trouble the Commission again.

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[1] Slip op. at 32.

[2] *Id.* at 39 (citing *Mass. Board*, 110 F.T.C. at 604 n.12).

[3] *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984) ("NCAA"); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) ("BMI"); *cf. Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ("GTE Sylvania") (establishing the primacy of economic effects in the analysis of non-price vertical restraints).

As the majority acknowledges, had it followed a horizontal restraints analysis based on *Mass. Board*, the result in the present case would have been the same: CDA's advertising restrictions would have been condemned as unreasonable restraints of trade without an elaborate "full" rule of reason inquiry.[4] That result, however, would not have entailed the diminution in the relative clarity and coherence of FTC horizontal restraints analysis that we may surely expect to follow from the majority's reasoning in this case.

I.

The majority's decision not to rely on *Mass. Board* analysis in this case is puzzling. In *Mass. Board*, the Commission condemned a state optometry board's regulations restricting several types of truthful, nondeceptive advertising, including the advertising of price discounts.[5] The factual and legal issues analyzed in that matter are therefore similar to those now before the Commission. Moreover, in *Mass. Board* the Commission set out a "structure for evaluating horizontal restraints" that is both consistent with the Supreme Court's teaching and, as the Commission observed in that case, "more useful than the traditional use of the *per se* or rule of reason labels."[6] Nevertheless, the majority sidesteps *Mass. Board* analysis in

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[4] It is well established that the rule of reason may be expeditiously applied in appropriate cases. *See generally NCAA*, 468 U.S. at 109-10 n.39 ("the rule of reason can sometimes be applied in the twinkling of an eye" (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981))).

[5] 110 F.T.C. at 604-07. Although the horizontal restraints at issue in *Mass. Board* were promulgated by a state board, the Commission found the state action doctrine inapplicable because the Commonwealth of Massachusetts had not clearly articulated a policy to displace competition with state regulation. *Id.* at 614. The Commission condemned the challenged advertising restrictions under Section 5 of the FTC Act because they met Sherman Act 1's definition of a "contract, combination . . . , or conspiracy, in restraint of trade . . ." *Id.* at 606-08, 610-11.

[6] *Id.* at 603-04.

favor of the *per se* and rule of reason "labels" it found wanting not that many years ago.

Presented with a challenge to a trade association's promulgation and enforcement of restrictions on price advertising among the association's members, the majority first selects a serviceable *per se* category: "[I]t is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws."[7] The majority finds that CDA's restrictions amount to the prohibition of truthful and nondeceptive price advertising[8] and equates that behavior with "a naked attempt to eliminate price competition."[9] The opinion's classification of the restraints imposed by CDA effectively brings the horizontal restraints analysis to an end. Rather than inquire into the actual competitive effect of CDA's advertising restrictions, the core of the majority's *per se* analysis reviews in general the evils associated with restraints on price advertising[10] and leads to the authoritative conclusion that "CDA's restraints on price advertising are thus illegal *per se*."[11] Thus is born a new category of *per se* unlawful restraints.

The opinion then proceeds to demonstrate that the same price advertising restrictions would have been condemned under the rule of reason.[12] Although I presume that this demonstration is for the benefit of benighted adherents of the

[7] Slip. op. at 16.

[8] *Id.* at 17-19.

[9] *Id.* at 19.

[10] *Id.* at 19-23.

[11] *Id.* at 24.

[12] *Id.* at 24-38.

Mass. Board approach,[13] the exercise in fact tends to vindicate the use of *Mass. Board* in the first place.

II.

The majority should have applied *Mass. Board* analysis in the present case not simply because it is apposite, but also because it -- and not the reinvigoration of the *per se* rule -- is consistent with the broad outlines of the past two decades of Supreme Court antitrust jurisprudence. The Commission's opinion in *Mass. Board* developed from a line of cases in which the Supreme Court sent the clear message that the analysis of a particular restraint of trade should be based on an understanding of the restraint's effect on competition. In cases including *BMI, NCAA,* and *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) ("*IFD*"), the Court signaled its dissatisfaction with the use of rigid, outcome-determinative categories.[14]

As the majority correctly notes, for purposes of determining the legality of a restraint under Section 1 of the

[13] Whatever support a literal reading of one isolated sentence in *Mass Board*, 110 F.T.C. at 607, lends to the majority's statement that the Commission "summarily condemned the price advertising restraints" at issue in that case, slip op. at 23, I cannot agree with my colleagues' conclusion that CDA's price advertising restrictions can therefore be declared *per se* illegal. The Commission did not reach its conclusion in *Mass. Board* by mechanically applying a *per se* rule to the Board's restrictions; rather, it proceeded through the truncated rule of reason approach set out earlier in that opinion. *Mass. Board's* "summary" condemnation thus included an assessment of whether the restrictions were inherently suspect and an examination of efficiency justifications. 110 F.T.C. at 606-07.

[14] Just as *BMI, NCAA,* and *IFD* indicated the need for economic depth in the treatment of horizontal restraints of trade, so the earlier decision in *GTE Sylvania, supra,* announced the Supreme Court's abandonment of its rigid *per se* treatment of non-price vertical restraints. *GTE Sylvania, BMI,* and succeeding cases demonstrate the evolution of the Court's approach away from bright-line categories and toward the application of sophisticated economic inquiry.

Sherman Act, "the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition."[15] The rule of reason is the "prevailing standard" for assessing the effect on competition of most restraints.[16] Moreover, the Supreme Court has stated in the clearest possible terms that any "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[17] The rule of reason approach prevails because whenever antitrust analysis is too far removed from an inquiry into actual effects upon actual markets, the risks of overdeterrence rise dramatically. For this reason, *per se* rules are to be applied with the utmost circumspection.

As noted earlier, over the past two decades the Supreme Court has steadily diminished the scope of *per se* analysis in antitrust jurisprudence.[18] This evolution reflects the Court's increasing disposition to ground determinations of antitrust "harm" on actual effects on competition. The Commission's truncated rule of reason analysis in *Mass. Board* is quite consistent with that trend. Whatever the restraint, under *Mass. Board* there is at least some inquiry into its likely economic effect and into whether a plausible efficiency might merit a fuller weighing of the restraint's

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[15] Slip op. at 14 (citing *NCAA*, 468 U.S. at 104; *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 691 (1982)).

[16] *GTE Sylvania*, 433 U.S. at 49.

[17] *Id.* at 58-59.

[18] *See, e.g., Northwest Wholesale Stationers* (rule of reason inquiry appropriate for some group boycott claims); *NCAA* (rule of reason analysis applied to agreement among competing college football teams to fix prices for all television broadcasts of their games); *BMI* (rule of reason analysis for agreement among thousands of competing songwriters to contract with a single entity to fix prices for performance rights to their songs); *GTE Sylvania* (rule of reason analysis to be applied to all vertical non-price restraints in the absence of market power).

procompetitive benefits against its anticompetitive consequences.[19]

There is no basis for concluding that the Supreme Court has swerved from the path charted in *BMI* and *NCAA* of requiring analysis -- even the "truncated" variety -- rather than the use of categories.[20]

III.

The majority opinion asserts that "[a] *per se* category of violation may emerge as courts gain familiarity with the almost invariably untoward effects of a particular practice across economic actors and circumstances."[21] Then, quoting from *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982), the majority states that "'once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable'"[22] -- *i.e.*, it has declared the restraint *per se* unlawful.

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[19] *Mass. Board*, 110 F.T.C. at 604.

[20] My reluctance to apply a *per se* approach to respondent's restrictions on price advertising is only heightened by the Supreme Court's "general reluctance" -- recognized by the majority, slip op. at 24 -- to apply a *per se* approach to codes of conduct of professional associations. *See, e.g., IFD*, 476 U.S. at 458; *United States v. Brown Univ.*, 5 F.3d 658, 671 (3d Cir. 1993).

[21] Slip op. at 15.

[22] *Id. Maricopa* is a textbook example of why structured case-by-case analysis is usually preferable to a *per se* rule. As one distinguished commentator put it:

> The courts have repeatedly invoked the per se label without the faintest comprehension of the commercial functionality of the practice they were condemning. One need only go back as far as the *Maricopa County* case . . . . As this case demonstrates, if per se

But on what foundation rests the majority's conviction that CDA's restrictions on price advertising belong in the narrow group of practices that can be declared illegal without at least an initial inquiry into their reasonableness? If "*[p]er se* categories of unlawful economic activities . . . consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial redeeming virtues,"[23] how can the majority be confident that it has properly placed CDA's restraints on price advertising in such a category? Doesn't *per se* condemnation of CDA's price advertising restrictions sidestep the need to answer "the ultimate question" raised by each restraint of trade, *viz.*, "whether the challenged restraint hinders, enhances, or has no significant effect on competition"?[24]

If a determination of *per se* illegality means that a restraint has "almost invariably untoward effects . . . across economic actors and circumstances,"[25] then presumably one consequence of today's ruling is that the Commission will

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> condemnation is made before understanding is achieved, understanding may never be achieved; the legal classification precludes the development of a trial record that would elucidate the challenged practice.

William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 Calif. L. Rev. 933, 936 (1987) (citation omitted).

Although *Maricopa* involved unreasonable restraints of trade, its broad application of the *per se* rule to physician agreements regarding price has frustrated an informed reexamination of provider combinations in an era of burgeoning managed care. It has been persuasively suggested that *Maricopa*'s unnecessarily broad *per se* rhetoric has contributed to the current overdeterrence of many potentially efficient combinations of health care providers. *See, e.g.*, Clark C. Havighurst, *Are the Antitrust Agencies Overregulating Physician Networks?*, 8 Loy. Consumer L. Rep. (forthcoming 1996).

[23] Slip op. at 15.

[24] *Id.* at 14.

[25] *Id.* at 15.

feel no obligation to perform an analysis of particular market circumstances before condemning other restrictions on truthful, nondeceptive price advertising in a wide array of future cases. One court of appeals has observed that the Supreme Court has been more hesitant to apply a *per se* rejection to competitive restraints imposed in contexts where the economic impact of such practices is neither immediately apparent nor one with which the Court has dealt previously.[26] Thus, I question whether the Commission should establish a rule in future cases that restraints on truthful, nondeceptive price advertising -- even in markets to which the Commission has had no prior exposure -- are "beyond justification in the sense that any argument as to the harmlessness of the restraint, or any proffer of procompetitive justifications for the practice, will generally not be considered."[27] If CDA's restrictions on price advertising are unlawful -- as they have appropriately been held to be -- it is not because some of them fit into a "category." Rather, it is because a properly framed competition analysis, however truncated, shows that they -- together with CDA's restraints on non-price advertising -- lessen competition.

IV.

The majority also treats CDA's restraints on price and non-price advertising under a dubious variant of the "truncated" rule of reason.[28] Instead of asking the structured

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[26] *Unites States v. Brown Univ.*, 5 F.3d at 671.

[27] Slip op. at 15. Cases such as *BMI* and, for that matter, the case in which the Supreme Court set forth the classic articulation of the rule of reason -- *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918) -- illustrate the Court's longstanding reluctance to condemn uncritically arrangements that on their face more closely resemble "naked" price-fixing than do CDA's price advertising restrictions. *See also* cases cited *supra* note 18.

[28] Slip op. at 24-39.

series of questions posed by *Mass. Board* [29] a set of questions that lends itself flexibly to the appraisal of horizontal restraints -- the majority imports into its analysis issues that may or may not be relevant under a properly conducted *Mass. Board* approach.

The flexibility afforded by the *Mass. Board* framework serves, among other goals, the ends of judicial economy. In certain cases, evidence sufficient to support the condemnation of a horizontal restraint may fall short of what would have appeared in the record of a "full" rule of reason trial. For example, if the challenged restraint "appears likely, absent an efficiency justification, to 'restrict competition and decrease output,'"[30] and if there is no plausible efficiency justification for the practice, then a finding of illegality is appropriate even if market power (ant other elements of "the full balancing test of the rule of reason"[31]) have not been established. On the other hand, in cases in which the restraint's likely anticompetitive effect is not apparent, or in which a proffered efficiency justification deserves a detailed examination, the full rule of reason approach -- including scrutiny of market power in many cases -- is necessary.

Nevertheless -- and despite language to the contrary in the opinion[32] -- the approach that the majority uses in place of *Mass. Board* makes a fairly elaborate assessment of market power a key element of its "quick look" approach. Although the Administrative Law Judge's anomalous determination with respect to market power[33] may have impelled the

[29] 110 F.T.C. at 604.

[30] Id. (quoting *BMI*, 441 U.S. at 20).

[31] *Mass. Board*, 110 F.T.C. at 604.

[32] Slip op. at 25 ("The anticompetitive effects of CDA's advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion . . .").

[33] Initial Decision at 76.

majority to discuss the issue at length, I am concerned that the majority opinion may be read to imply that an assessment of market power is a necessary part of the truncated rule of reason approach.

Let me be clear that I am by no means saying that the issue of market power should never play a role in truncated rule of reason analysis of horizontal restraints. Frequently the answers to the initial questions in the *Mass. Board* sequence will show that evaluation of market power is required. But in some cases those answers -- that the challenged restraint is likely to restrict competition, and that it lacks a plausible efficiency rationale -- will indicate that a restraint can be fairly condemned without a potentially elaborate and expensive inquiry into market power.

V.

It is only fair to note that *Mass. Board* is not without its faults and its critics. But if the majority considers *Mass. Board* beyond repair, why has it not overruled the case? If the majority has identified specific weaknesses in *Mass. Board* analysis that might be remedied, why not apply *Mass. Board* in this and other appropriate cases so that the process of case-by-case adaptation and improvement can occur?

As I stated at the outset, the problem with the majority's decision today is not the result. It is the reasoning that tends to determine the lasting significance of an opinion. The majority's reasoning, which amounts to a return to the conclusory labeling that the Commission sought to supplant in *Mass. Board*, is likely to cause confusion in future cases. How will the majority's analysis in *CDA* apply in the next price-related advertising case? Will the Commission summarily condemn any restraint hampering price-related advertising, or only those restraints that effectively *prohibit* price-related advertising? Without some type of rule of reason inquiry, how will we know whether restrictions on price advertising "effectively prohibit" price advertising in a given case? Will the Commission use today's newly-minted

per se rule alone or in combination with the backup rule of reason analysis it employs in the present case? Or, since the majority has not seen fit to overrule or modify *Mass. Board* in any way, can we expect to see the Commission apply *Mass. Board* analysis in the future, notwithstanding today's opinion? Unfortunately, all of these are now open questions.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	Docket No. D-9259
CALIFORNIA DENTAL ASSOCIATION, a corporation.	)	

INITIAL DECISION

By: Lewis F. Parker, Administrative Law Judge

Sally Maxwell, Esq.; Markus H. Meier, Esq.;
Gary H. Schorr, Esq.; Linda Blumenreich, Esq.;
George R. Bellack, Esq.; Allison Schwartz, Esq.
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I. INTRODUCTION

The Commission issued its complaint in this matter on July 9, 1993, charging California Dental Association ("CDA") with violations of Section 5 of the Federal Trade Commission ("FTC") Act, as amended, 15 U.S.C. § 45.

The complaint identifies CDA as a California corporation which is a professional association organized in substantial part to represent the interests of its dentist members who are required, if they want to belong to CDA, to join one of its 32 component dental societies.

The complaint charges that CDA has violated Section 5 of the FTC Act by restraining competition among dentists in California by acting as a combination of its members, or by conspiring with at least some of its members and its component societies to restrict unreasonably the dissemination of information to consumers by coercing its members to refrain from particular forms of advertising without regard to whether they are truthful and nondeceptive.

Accordingly to the complaint, these acts and practices have harmed consumers by preventing dentists from truthfully and nondeceptively informing the public of the price, quality, and availability of their services.

CDA's answer denied Commission jurisdiction over its activities because it is not a corporation within the generally accepted meaning of Sections 4 and 5 of the FTC Act, 15 U.S.C. §§ 44 and 45, because its activities do not restrain or affect interstate commerce directly or substantially, and because its activities are the result of its desire to fulfill its public service obligations.

After extensive pretrial discovery, trial was held in San Francisco, California, from February 7, 1995 to February 21, 1995. The parties filed their proposed findings of fact and conclusions of law on April 6, 1995. The record was closed on April 20, 1995.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and conclusions of law and answers thereto filed by the parties. I have adopted several proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. FINDINGS OF FACT

A. Description of CDA

1. Members

1. CDA is a professional association which is organized as a California non-profit corporation (Cplt at ¶ 1; Ans. at ¶ 1; Tr. 1139),[1] has no shares of stock or certificates of interest (Tr. 1769, 1141), and qualifies as a tax-exempt organization under Section 501(c)(6) of the IRS Code (Tr. 1770-71). CDA's principal place of business is located at 1201 K. Street Mall, Sacramento, California (Ans. at ¶ 1). It has approximately 200 employees (Tr. 1138).

2. CDA has more than 19,000 dentist members, of which 13,500-13,700 are in active practice, who provide dental services for a fee (Ans. at ¶ 2) (Tr. 1166; CX-1550, CX-1656). The members represent about 75% of the

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[1] Abbreviations used in this decision are:

Tr.:	Transcript of the trial
CX:	Commission exhibit
RX:	CDA's exhibit
Cplt:	Complaint
Ans.:	Answer
CB:	Complaint counsel's trial brief
RB:	CDA's trial brief
CPF:	Complaint counsel's proposed findings
RPF:	CDA's proposed findings
F.	Finding

practicing dentists in California (Tr. 1166; CX-1505, CX-1508-B, CX-1510-A, CX-1587-Z-107-08).

3. CDA is a "constituent" society of the American Dental Association ("ADA") (Ans. at ¶ 3; CX-1450-E) and its policies may not conflict with the ADA's Constitution and Bylaws (CX-1450-J). Its Code of Ethics conforms with the Principles of Ethics and Code of Professional Conduct of the ADA (CX-1450-J). To be eligible for membership in ADA, a dentist practicing in California must be a member of CDA (Ans. at ¶ 3; Tr. 1139).

4. CDA has 32 "component" societies (Ans. at ¶ 3; CX-1450-I), which are local or regional societies, located within California, which it charters (CX-1450-E, I). The bylaws of the CDA component societies may not conflict with CDA's Bylaws or the Constitution and Bylaws of the ADA (CX-1450-I). CDA requires dentists to be members of the component within whose jurisdiction they practice in order to be eligible for membership in CDA (Ans. at ¶ 3; Tr. 1139; CX-1450-I).

5. Members of CDA are bound by the codes of ethics of ADA, CDA, and the members' respective component societies (CX-1450-Y).

6. CDA collects dues from its members for itself, its component societies, and ADA, and transmits those dues to its component societies and ADA (CX-1450-H, CX-1649-Y, CX-1650-Z-61, CX-1651-A-26-27). CDA dues are $525 (CX-1649-X), ADA dues are $330, and components charge from $135 to several hundred dollars annually; the average annual "tripartite" dues paid by a member to all three associations are about $1,100 (Tr. 1159). CDA also collects voluntary contributions for the California Dental Political Action Committee ("CalDPAC") from CDA members (CX-1649-X, CX-1650-Z-61).

7. For fiscal year 1993-1994, CDA projected annual revenues of $19,889,461 (CX-1484-P). Membership dues

represent the largest single source of CDA's revenues (Tr. 1762, Tr. 1142; CX-1484-P). Other major sources of revenues are: CDA scientific sessions; subscriptions to, and advertising in, CDA's official publications; interest income; sales of printed materials; and rent generated by CDA's headquarters building (CX-1484-P).

2. House of Delegates

8. CDA's House of Delegates is its supreme authoritative body (CX-1450-E) and is composed of 202 to 205 CDA members, 200 of whom are elected by CDA's component societies (Tr. 1139; Ans. at ¶ 3; CX-1450-J).

9. The House of Delegates has the power to determine CDA's policies, to amend its articles of incorporation, to adopt and amend its Code of Ethics, to determine and assess dues, to adopt an annual budget, to grant or revoke the charters of its component societies, and to elect its officers, members of its council, and delegates to the ADA House of Delegates (CX-1450-K, Q, Z-4, Z-5, CX-1472-A).

3. Board of Trustees

10. CDA's administrative and managing body, the Board of Trustees, is vested with the power to conduct its business according to the policies established by the House of Delegates (CX-1450-O).

11. The Board has 52 members, including 43 trustees elected by CDA's component societies, the seven elected officers of CDA and two "appointed officers" -- the Executive Director and Editor -- who are appointed by the Board (CX-1450-N, O, S-T).

4. Standing Committees

12. CDA has six standing committees: Executive, Communications, Direct Reimbursement, Finance, Nominating, and Interdisciplinary Affairs (CX-1450-V-Y).

5. Councils

13. CDA operates ten councils, each of which is responsible for specific functions (Tr. 1148; CX-1450-T-V, CX-1484-Z-23-28). They are the:

14. a. Judicial Council which is charged with interpretation and enforcement of the CDA Code of Ethics (including the advertising restrictions which are the subject of this proceeding), as well as the discipline of CDA members found to have violated its Code (CX-1450-U-V, CX-1484-Z-27-28, CX-1571-G).

15. b. Council on Legislation which formulates positions on legislation and regulation on behalf of CDA and its members (Tr. 1285, 1154, 1208; CX-1483-Z-13, CX-1484-Z-25). The council has a close working relationship with CalDPAC, the "political arm" of CDA (CX-1483-Z-13, CX-1484-Z-26).

16. c. Council on Membership Services which recruits CDA members and is responsible for membership services and benefits (CX-1524-E).

17. d. Council on Education and Professional Relations which oversees a variety of CDA programs, including those which maintain a liaison role with the laboratory industry and monitor national and statewide developments related to denturism and the expanded role of the dental hygienist (Tr. 1205-06; CX-1484-Z-24-25, CX-1571-I, CX-1649-N, Z-30-33).

18. e. Council on Dental Research and Development which monitors trends in infection control and monitors federal and state agency regulations (Tr. 1154; CX-1277-E, CX-1483-Z-11, CX-1484-Z-24).

19. f. Council on Peer Review which provides CDA members with a patient complaint resolution

alternative to costly and protracted litigation (Tr. 1151-52; CX-1448-D, CX-1520-A, CX-1563, CX-1644-B).

20. g. Council on Scientific Sessions which holds two sessions yearly featuring continuing education courses, and displays by hundreds of vendors of new technology, treatment modalities, supplies, and equipment (Tr. 1155; CX-1483-Z-14, CX-1484-Z-27, CX-1502-A, CX-1571-A, D).

21. h. Council on Insurance which develops, monitors, and evaluates insurance programs to serve the needs of CDA members through its subsidiary, The Dentists Company Insurance Services (CX-1482-Z-19, CX-1483-Z-12, CX-1484-Z-5, CX-1571-H).

22. i. Council on Dental Care Programs which monitors government health care programs (Tr. 1149; CX-1483-Z-10, CX-1484-Z-23-24) and the activities of the State Board of Dental Examiners (Tr. 1149). It also has provided: input to third-party payers concerning dental care benefits and claims, insurance claim information to CDA members, and, in conjunction with ADA, a contract analysis service to help members to understand the legal implications of dental contracting (Tr. 1204; CX-1484-Z-23, CX-1571-F; CX-1483-Z-10). It also sponsors an annual dental care and insurance conference (CX-1481-Z-22, CX-1482-Z-17, CX-1483-Z-10).

23. j. Council on Community Health which is CDA's communications center for dental health activities and promotes National Children's Dental Health Month and Senior Smile Week (CX-1484-Z-23, CX-1571-H).

6. For-Profit Subsidiaries

24. CDA has five for-profit subsidiaries--four of which are operating companies--and a holding company for the operating companies (Tr. 1168).

a. The Dentists Insurance Company ("TDIC")

25. TDIC is a dental malpractice insurance company which underwrites insurance in California only for CDA members (Tr. 1768, 1785, 1168; CX-1587-Z-74). It also underwrites insurance for non-CDA members in Minnesota (Tr. 1785).

26. As of October 1993, TDIC insured approximately 8,800 California dentists, about two-thirds of all actively practicing CDA members (CX-1478-G).

27. CDA created TDIC in 1979 (Tr. 1784; CX-1575-A) as a result of the malpractice crisis in California and the threat of prohibitive insurance premiums for professional liability insurance (CX-1587-Z-62-63, CX-1482-L).

28. Except for one person, all members of TDIC's Board of Directors are, and always have been, members or officials of CDA. CDA's Executive Director is the Vice-Chairman of the TDIC Board of Directors (CX-1587-Z-101-02). TDIC's offices are located in the CDA headquarters building (CX-1448-B, C, CX-1587-Z-58-59, Z-65).

29. TDIC has made dividend payments of $120,000 and $320,000 to CDA during the last two years (Tr. 1769; CX-1484-Z-30). Additionally, TDIC pays CDA's Government Relations Office ("GRO") $30,000 a year (Tr. 1785) for GRO's legislative and lobbying activities relating to professional liability insurance issues (CX-1650-Z-13-14).

b. The Dentists Company ("TDC")

30. CDA created TDC in 1982 to provide and broker a wide range of high quality products to CDA members (TR.

1776; CX-1652-Y, CX-1484-Z-29), and to contribute financially to CDA's activities (CX-1448-C, CX-1472-A). TDC offers professional and personal financial services and other services to CDA members (Tr. 1778-80; CX-1570-A-F).

31. Except for one non-dentist/non-employee member, all members of the TDC Board of Directors are, and always have been, members or officials of CDA (CX-1587-Z-101-02). CDA's Executive Director is the Vice-Chairman of the TDC Board of Directors (CX-1587-Z-102). CDA's Chief Financial Officer ("CFO") is the CFO and sole Vice-President of TDC (Tr. 1775-76). TDC's offices are located in the CDA headquarters building (Tr. 1778; CX-1448-B, C).

32. TDC made a dividend payment of $100,000 to CDA in September 1992 (TR. 1769; CX-1484-Z-29), and TDC's activities have added over $5 million to CDA's assets (CX-1483-Z-15), materially improving CDA's financial position (CX-1483-Z-15, CX-1637-D).

c. The Dentists Company Insurance Services ("TDCIS")

33. CDA created TDCIS in 1983 (Tr. 1781). TDCIS is the broker/administrator for a number of CDA-sponsored business and personal insurance plans offered to CDA members (Tr. 1768, 1783-84; CX-1558-A-F, CX-1575-G-H). These insurance plans are offered only to CDA members (Tr. 1782; CX-1652-Z-9) and, in some cases, to the spouses and staff of CDA members and to employees of CDA's local component societies (CX-1558-A, F, CX-1575-G). TDCIS's insurance plans have more than 13,000 policyholders and more than 30,000 individual policies in place (Tr. 1782-83; CX-1484-W, Z-25, Z-29). TDCIS bills and collects more than $55 million a year (Tr. 1783; CX-1484-W, Z-29).

34. TDCIS has a "close working relationship" with CDA's Council on Insurance (CX-1484-Z-29), which is "the

entity that determines which insurance programs will be sponsored by [CDA], and subsequently brokered by [TDCIS]" (CX-1649-V). Members of the TDCIS staff attend the council's meetings and "maintain close levels of communication" (CX-1484-Z-29).

35. Except for one non-dentist/non-employee member, all members of the TDCIS Board of Directors are, and always have been, members or officials of CDA (Tr. 1781; CX-1587-Z-101-02). CDA's Executive Director is the Vice-Chairman of the TDCIS Board of Directors (CX-1587-Z-102). CDA's CFO is the CFO and sole Vice-President of TDCIS (Tr. 1780; CX-1652-V). TDCIS's offices are located in CDA's headquarters building (Tr. 1782; CX-1448-B, C).

36. "Each year, TDCIS has presented [CDA] with a dividend or other support based on TDCIS's income" (CX-1475-D). TDCIS pays CDA's GRO $30,000 a year (Tr. 1781-82) for legislative and lobbying activities relating to insurance issues (CX-1650-Z-13-14).

d. The Dentists Company Management Services ("TDCMS")

37. CDA created TDCMS in 1987 (CX-1346-E). Its function is to manage the operation of the CDA headquarters building (Tr. 1768). Prior to 1994, TDCMS also provided many of the administrative services currently provided to CDA and its subsidiaries by CDA Holding Company, Inc. (CX-1346-E, CX-1466-A, G). CDA's Executive Director is the Chairman of the Board of TDCMS (CX-1652-Z-1-2). CDA's CFO is the CFO and Vice-President of TDCMS (Tr. 1784).

e. CDA Holding Company, Inc. ("CDAHC")

38. CDAHC was created to assume ownership of CDA's for-profit subsidiaries as part of its corporate

reorganization in 1993 (Tr. 1764, 1773; CX-1466-A, G, CX-1472-A, N).

39. This reorganization was done primarily to further define and protect CDA's status as a § 501(c)(6) tax-exempt organization (Tr. 1774, 1188; CX-1472-A, N, CX-1587-Z-60, CX-1652-Z-5).

40. CDA is the sole owner of CDAHC which, in turn, holds the stock of CDA's other for-profit subsidiaries (Tr. 1768, 1773, 1187).

41. CDA elects the members of CDAHC's Board of Directors (Tr. 1188-89, 1778; CX-1450-K, M, Z-4-5), and CDA's Board of Trustees may remove directors of CDAHC (CX-1450-O, CX-1587-Z-67). All but one member of CDAHC's Board of Directors are members or officials of CDA (Tr. 1189, 1792; CX-1450-Z-5, CX-1587-Z-66-67). CDA's current President is a member of CDAHC's Board of Directors (Tr. 1413; CX-1651-Z-20); CDA's Executive Director is Chief Executive Officer of CDAHC (Tr. 1136; CX-1652-R); and CDA's CFO is the CFO and sole Vice-President of CDAHC (Tr. 1787-88; CX-1652-Q). CDA employees assist CDA's CFO with his duties relating to CDA's for-profit subsidiaries (CX-1652-K-L, R, X). CDAHC pays a portion of the salaries of CDA's CFO and the staff that assists him in providing services for CDAHC (Tr. 1774-75; CX-1652-S).

42. CDA's House of Delegates recommends candidates for the boards of directors of the operating companies to CDAHC, which then selects the directors of the operating companies (CX-1450-K, O, Z-5, CX-1587-Z-67). CDAHC may remove and replace any of a subsidiary operating company's board members (CX-1450-Z-5).

43. CDA's Bylaws provide for payments by CDAHC to CDA of dividends or other payments generated by CDA's for-profit subsidiaries (CX-1450-Z-5, CX-1466-A, CX-1484-W, CX-1587-Z-103). By design, CDAHC

currently does not generate profits; instead, it bills CDA and its subsidiaries for administrative services it provides, at cost (Tr. 1775).

7. Nonprofit Subsidiaries

44. CDA has two nonprofit subsidiaries organized under § 501(c)(3) of the IRS Code: The CDA Relief Fund grants financial aid to dentists, their dependents, and survivors. The CDA Charitable Fund maintains a separate financial account for a disaster loan program (Tr. 1167-68, 1172; CX-1450-Z-4).

8. Rotunda Partners

45. CDA is the general partner of Rotunda Partners, which owns most of the CDA headquarters building in Sacramento (Tr. 1790). CDA owns 60% of Rotunda; TDIC owns the remaining 40% (Tr. 1169; CX-1652-Z-3).

9. California Dental Political Action Committee ("CalDPAC")

46. CalDPAC is an unincorporated association of dentists that was formed to make financial contributions to political candidates and parties sympathetic to issues of concern to dentistry (CX-1483-J, CX-1587-Z-129, CX-1650-Z-67-69).

47. CalDPAC is not legally a subsidiary or division of CDA, but it is considered the "political arm" of CDA and is closely affiliated with it (CX-1483-Z-13, CX-1484-Z-26, CX-1650-Z-3-4, Z-16, Z-50-55, Z-62-63, Z-67-68, CX-1587-Z-129-31; Tr. 1202).

48. Approximately 40 to 45% of CDA members contribute to CalDPAC (Tr. 1194; CX-1448, CX-1464-G, CX-1650-Z-65).

49. Over the past several years, the level of CalDPAC's political contributions has remained stable, at approximately $300,000 to $350,000 per two-year state legislative cycle (Tr. 1194; CX-1448-D, CX-1644-B, CX-1650-Z-67-68).

B. Interstate Commerce

1. Interstate Reimbursement For Dental Services

50. Fifty percent of the funding for California's Medicaid programs for dental services ("Denti-Cal") comes from the federal government. In calendar year 1994, the Denti-Cal program paid out approximately $500 million to billing providers, most of whom were members of CDA (Tr. 728, 1286; CX-1658).

2. Interstate Sale and Lease of Equipment and Supplies

51. CDA members purchase, lease, and use substantial amounts of dental equipment and dental-related products from manufacturers and suppliers located outside of California (Tr. 1405, 295-96, 750-55, 1000-02, 463-64, 328-29, 673-75; CX-1651-Q).

52. The CDA Journal and CDA Update carry many advertisements for products and services by out-of-state manufacturers and suppliers (CX-1451-E, G, CX-1452-B, CX-1455-E, I, CX-1456-J, L, CX-1457-L, CX-1458-E, CX-1461-H, CX-1466-D, CX-1470-J, CX-1474-E, CX-1476-K, CX-1476-F, G, N, CX-1479-K, N, CX-1480-H, CX-1482-M, Z-8, Z-10, Z-13, Z-46, Z-48, Z-54, CX-1483-Z-19, CX-1484-Z-12, Z-32, Z-53), and a substantial number of readers of the publications purchase such items (CX-1453-P).

53. CDA's scientific sessions feature exhibitions by many out-of-state vendors of dental-related products and services which CDA members may purchase (Tr. 782-83, 1772; CX-1452-A, CX-1571-A).

3. Other Activities of CDA and Its Members Involving Interstate Commerce

54. In some cases, out-of-state suppliers of services to CDA members have been unable to use certain advertising practices because of CDA's ethical advertising restrictions (Tr. 803-05, 603-10; CX-1209). CDA has placed advertisements, which must comply with its Code of Ethics, in publications with national distribution, including the Wall Street Journal, Fortune, and Business Week (CX-1455-M, CX-1450-V, X, CX-1651-Z-43).

55. "[M]any of CDA's members have been and are now in competition among themselves and other dentists, both within and outside the State of California" (Ans. at ¶ 4), and some CDA members reside outside of the State (CX-1656).

56. CDA members treat patients who reside outside of California (Tr. 1405, 771-72, 293, 1000, 462-63, 326-27, 672-73; CX-1608-M-N, CX-1611-I, Z-87, CX-1651-N-O), and approximately 4.5% of its members reside outside of California (CX-1656).

57. CDA and its components use the U.S. Postal Service to communicate with their members or applicants for membership whose advertising they challenge (Tr. 1021, 354). They also communicate, when necessary, with the ADA, which is located in Chicago, Illinois (Tr. 374-75, 1223; CX-1587-Z-55, CX-1450-Z-1-2, CX-1469-Z-57-58, CX-1651-Z-71). CDA also uses the Postal Service to deliver its Journal and Update to out-of-state concerns (Tr. 1772-73; CX-1481-Z-26-31, CX-1482-Z-49-53, CX-1484-Z-47-51, CX-1448-D, CX-1571-D, CX-1625-I-N).

58. CDA officials and members attend out-of-state conferences (Tr. 1185; CX-1450-K, Z-3, Z-40-41, CX-1587-Z-51-54, CX-1651-Z-27-29).

59. CDA, through TDC and TDCIS, offers services to CDA members through out-of-state firms, including

providers of life insurance (CX-1480-K), medical insurance (CX-1558-B), income insurance (CX-1558-C), disability insurance (CX-1558-D), accidental death and dismemberment insurance (CX-1480-D, F, CX-1558-E-F), office property insurance (CX-1480-D, F, CX-1558-E-F), VISA cards (CX-1484-Z-29), home equity loans (CX-1484-Z-29), home mortgages (CX-1484-G), and long distance phone service (CX-1484-Z-29).

60. TDIC operates in Minnesota and has applied for licenses to do so in other states (CX-1468-E, CX-1480-A, CX-1484-Z-30).

61. CDA secured a loan for $39 million from an out-of-state insurance company to purchase its current headquarters building in Sacramento, California (Tr. 1790-91; CX-1470-F, CX-1652-Z-34-35).

62. CDA collects annual ADA membership dues from California members and transmits them to ADA headquarters in Illinois (Tr. 1190, 1415).

C. CDA Activities Conferring Pecuniary Benefits on Its Members

1. CDA's Purpose

63. CDA has often stated that one of its primary purposes is to "represent dentists in all matters that affect the profession" (CX-1546-A), and it provides the kind of benefits which individual dentists could not realize by acting individually (CX-1488, CX-1502-A, CX-1508-B, CX-1509-B, CX-1510-A, CX-1533, CX-1544).

2. Source of Revenues

64. CDA's budgeted revenue for its 1993-94 fiscal year was $19,889,461 (CX-1484-P). Its largest source of funding was membership dues and revenue derived from membership-related activities such as the sale of professional

liability insurance to members (Tr. 1762, 1142, 1812). CDA's current dues for active members are $525. The average cost of dues for members of ADA, CDA and a CDA component ("tripartite dues") is approximately $1100 (Tr. 1159).

3. Tax Status

65. CDA is exempt from federal income taxation pursuant to § 501(c) (6) of the Internal Revenue Code, 26 U.S.C. § 501(c) (6) (Tr. 1770, 1141, 1853; CX-1587-Z-55), which exempts "business leagues, chambers of commerce, real estate boards and boards of trade" consisting of members that share common business interests (26 C.F.R. § 1501(c) (6)-1; Tr. 1771, 1853). CDA is not exempt from federal income taxation under § 501(c) (3) of the Code, 26 U.S.C. § 501(c) (3), which governs organizations formed and operated solely for religious, charitable, scientific, or educational purposes (Tr. 1853).

66. In calculating their federal and state income taxes, members of CDA may not deduct the cost of membership dues as a charitable contribution (Tr. 1416, 1858). Instead, members of CDA may deduct most of their dues as ordinary and necessary business expenditures directly connected with or pertaining to their trade or business (26 C.F.R. §§ 1.162-1(a), 1.162-6; Tr. 1415). However, CDA members may not deduct that portion of association dues allocated by CDA to political lobbying activities (Tr. 1416; CX-1478-C; CX-1479-N, CX-1587-Z-111-12), which, in 1993, was estimated to be approximately $26 per member (CX-1478-C, CX-1479-N).

4. General Benefits of CDA Membership

67. CDA has often touted the benefits of membership, including such statements as:

> [CDA] is dedicated to offering the most comprehensive array of benefits and programs to assist practitioners in

> practice management. OSHA compliance and infection control to name a few (CX-1575-B).
>
> [CDA] offers far more services to its members than any other state [dental] association (CX-1544).

In fact, CDA's accounting expert identified upwards of 50 CDA membership benefits (Tr. 1843), whose value exceeds the average membership dues, resulting in a net benefit to its members (Tr. 1849, 1851-53, 1859).

68. CDA has stated that a selection of its programs and services has a potential value to members of between $22,739 and $65,127 (CX-1520-A-B, CX-1571-A, L). In 1993, its president stated: "CDA is extremely valuable to the members . . . CDA members are getting their money's worth and then some" (CX-1473-O).

69. CDA's "Direct Member Services" have accounted for as much as 65% of its total financial expenditures in a given year, with "Association Administration & Indirect Member Services" accounting for an additional 20% of expenditures (Tr. 1192-93; CX-1448-C, CX-1587-Z-120-21). The last time CDA conducted this analysis, "Services to the Public" accounted for seven percent of CDA's total expenditures (Tr. 1193; CX-1448-C).

5. Specific Benefits of CDA Membership

a. Lobbying and Efforts to Influence Government Action

(1) Council on Legislation

70. CDA's Council on Legislation monitors legislative and regulatory actions which have potential implications for dentistry and adopts policy positions on behalf of CDA (CX-1484-Z-25; Tr. 1285). CDA's GRO takes the policies established by the Council on Legislation and argues for them before the appropriate governmental body (Tr. 1285;

CX-1562, CX-1571-E). The Council on Legislation gives GRO explicit instructions on about 100 bills per session of the California Legislature (CX-1650-Z-33).

71. CDA budgeted $121,309 for "government relations" activities for 1993-94, not including the salaries of GRO's seven employees (CX-1650-Z-4, Z-37, Z-43, CX-1652-Z-22-33).

72. In 1992, CDA's President told its members:

> Government is like an octopus in our lives. Its tentacles are everywhere: in our dental practices and in our homes. If CDA's not there, who is watching out for the interests of dentists? Nobody (CX-1484-X).

73. CDA has also claimed that it "provide[s] a strong, unified voice as we represent the interests of our members before regulatory agencies" (CX-1502-A).

74. Other remarks of CDA officials have emphasized the pecuniary benefits of its lobbying activities:

> CDA's [l]egislative wins "mean money" to members (CX-1463-A).
>
> CDA represents the interests of its members and has been successful in defeating several bills which would have cost practitioners several thousands of dollars a year (CX-1532-A).

CDA's President stated, in 1993:

> [w]hat we save the dentist in potential costs of what the government would like to do, saves the CDA member at least the equivalent of their annual dues every year (CX-1473-N).

75. Specific examples of CDA actions affecting government decisions include:

(2) Infectious/Hazardous Waste Regulation

76. CDA successfully opposed passage of provisions of three bills relating to infectious waste regulation, hazardous waste generator permits, and informed consent before placement of silver amalgam (CX-1458-F, CX-1463-A, I, CX-1483-K, CX-1510-A, CX-1520-A, CX-1539) at a CDA-estimated savings of over $2,000 per year of practice and $66,000 over 30 years (CX-1510-A, CX-1520-A).

(3) Malpractice Reform

77. CDA supported passage of California's Medical Injury Compensation Reform Act of 1975 ("MICRA") (CX-1555-I, CX-1587-Z-140-41) and continues to defend it (Tr. 1306). The passage of that bill, according to CDA's immediate past President, was of great benefit:

> Professional Liability Premiums in California last year were one billion dollars. Without MICRA, it is estimated conservatively that the figure would easily exceed 2.5 billion dollars. That increase alone would pay all your CDA/ADA/local dues each year forever. What MICRA has done is assure that payments go to victims, that the costs of litigation are reduced, that windfalls are eliminated, and most importantly, that healthcare providers such as you and I can continue to treat patients without the fear of unfounded lawsuits (CX-1484-R, T).

(4) Workers' Compensation

78. CDA successfully supported a package of workers' compensation reform bills, which are projected to save employers, including dentists, a total of $1.5 billion (CX-1477-F).

(5) Taxation of Dentists and Dental Practices

79. CDA, along with others, successfully opposed Proposition 167 which would have increased taxes for high bracket taxpayers (CX-1466-D, F, CX-1484-K).

(6) Mandatory Employer Healthcare Coverage

80. In 1992, CDA successfully opposed Proposition 166, which would have required employers, including dentists, to provide basic health care insurance coverage for part-time employees and their dependents (CX-1466-D, CX-1468-E, CX-1484-K).

(7) Denti-Cal

81. CDA has fought to preserve funding of the dental Medicaid program operated by the State of California ("Denti-Cal") (Tr. 726), and its efforts were "instrumental in retaining the Denti-Cal program and enhancing reimbursement rates" (CX-1571-A). More than 5,000 CDA members provide dental services to Denti-Cal patients (CX-1658).

(8) Unsupervised Practice By Dental Hygienists

82. CDA opposes, and has opposed, legislation that would permit dental hygienists to practice without supervision by a dentist (CX-1462-D, CX-1476-C, CX-1481-P, CX-1482-U, CX-1483-Z-13, Z-37, CX-1484-R, CX-1485-B, CX-1571-A, CX-1587-Z-138), an issue which affects dentists' "pocketbooks" (CX-1473, CX-1477-F, CX-1484-X).

(9) CalDPAC

83. CalDPAC's political activities benefit CDA members economically (CX-1277-C, CX-1375-B, CX-1462-E, CX-1472-F, CX-1483-J, CX-1520-A, CX-1571-A). In 1993, CDA's President described the GRO and CalDPAC as "of all we do, the things with the most importance for our future" (CX-1474-I, CX-1484-N).

(10) Litigation

84. CDA has been involved in legal challenges to or arguments in support of government and regulatory policies, including a challenge to HHS regulations implementing the Health Care Quality Improve Act (CX-1477-A, CX-1482-M, S-T). CDA estimated the value of victory in that case as "[i]ncalculable related to reputation" (CX-1571-L). See also CX-1453-C, CX-1480-D, H. CX-1650-L-M, CX-1461-F, CX-1472-H, CX-1587-Z-150, CX-1482-U, CX-1483-Z-38, Z-41.

(11) Other Government Action

85. CDA has supported or opposed many other legislative or regulatory actions which would affect its members' pocket books (CX-1474-E, K, CX-1484-Z-25, CX-1485-A, B, C, CX-1483-Z-13, Z-40, CX-1467-K, CX-1476-A, CX-1464-K, CX-1481-V, CX-1452-A, F, G, CX-1637-F, CX-1463-K).

b. Marketing and Public Relations

86. CDA budgeted over $2.1 million for its marketing program for 1993-94 (CX-1484-P, CX-1652-Z-20). A major goal of this program, which is assisted by an advertising agency and a public relations firm (Tr. 1164; CX-1446-O, CX-1469-E, CX-1484-Z-1-2, CX-1587-Z-152-54) is to enhance the image of CDA and its member dentists and to distinguish the latter from non-members in terms of their

commitment to quality care (Tr. 1412; CX-1481-X, CX-1483-Z-37, CX-1484-F, CX-1563, CX-1587-Z-155-56, CX-1648-A-B, CX-1651-Z-42, CX-1654-D, CX-1455-M).

87. Other marketing schemes used by CDA include: a campaign encouraging dental patients to insist that their dental plans give them the right to choose their own dentists (CX-1481-N, S, CX-1508-A, CX-1552-G); a campaign to encourage the Latino population to use CDA dentists (CX-1469-E, CX-1473-M, CX-1475-K, CX-1476-A, CX-1484-Z-2); and, the use of CDA logos on stationery and other business materials (CX-1497, CX-1555-F).

88. In 1985, CDA estimated that increased patient visits to member dentists because of the marketing program resulted in "nearly $6,000 in additional revenues [per member dentist], or a 20-to-1 return on investment" (CX-1231-B).

c. Direct Reimbursement

89. Since at least 1989, CDA has promoted "direct reimbursement," an alternative to closed panel dental insurance plans (CX-1460-E, CX-1456-F, CX-1465-F, CX-1473-G, CX-1508-A) under which employers self-fund the cost of dental benefits for their employees, without insurance company involvement (CX-1275-C, CX-1473-G).

90. Direct reimbursement benefits CDA members (CX-1534, CX-1535) by "eliminat[ing] many of the restrictions imposed by the insurance carriers" (CX-1457-J).

91. CDA has established a Direct Reimbursement Committee which administers this program, for which CDA budgeted $94,985 (excluding staff salaries) in fiscal year 1993-94 (CX-1450-X-Y, CX-1484-P, CX-1652-Z-19, Z-22-23).

d. Practice Management and Related Programs and Services

92. CDA's twice-annual scientific sessions offer seminars on topics relating to the non-clinical aspects of dental practice, including practice management, risk management, dental administration, and investment and estate planning (CX-1448-D, CX-1481-Z-36-37, CX-1482-Z-29-30, CX-1483-Z-57, Z-60-61, CX-1512-B, CX-1522-F).

93. CDA's for-profit malpractice insurance subsidiary, TDIC, has offered practice improvement seminars dealing with patient relations and dental practice risk reduction (CX-1482-Z-37, CX-1484-Z-30, CX-1511-C, CX-1512-A, CX-1587-Z-82). TDIC also provides a quarterly newsletter, a home-study course, and a lending library of risk management resources (CX-1482-Z-37, CX-1563-E, CX-1571-J).

94. In response to "membership concerns about the impact of new OSHA and [EPA] regulations on dental practice" (CX-1481), CDA developed an OSHA compliance manual ($25 for members, $255 for non-members) (CX-1481-N, V, CX-1483-Z-11, Z-40, CX-1501, CX-1503, CX-1528, CX-1531, CX-1537, CX-1562-G, CX-1571-G, CX-1573-D, CX-1575-D; Tr. 1174).

95. CDA provides its members with "delinquent license notification" (CX-1458-A), a service which allows members whose licenses have expired to correct their status before the licenses are canceled (CX-1526-C).

96. Another "important membership benefit" (CX-1494, CX-1566-B) is CDA's provision to members of OSHA and labor law posters required by law to be displayed in dental offices (Tr. 1174; CX-1462-L, CX-1483-K, CX-1492-A-B, CX-1499, CX-1501, CX-1510-A, CX-1573-D). CDA also provides members with information

about compliance with the Americans With Disabilities Act (CX-1503, CX-1510-A).

97. CDA provides other practice-related programs to members: A professional placement program which, CDA has stated, can save members several thousand dollars (CX-1520-B, CX-1448-E, CX-1453-O, CX-1493, CX-1513-B, CX-1515-B, CX-1520-B, CX-1524-A, CX-1543) (free to members: $100 per six month period for non-members); a guidance or "mentor" program under which experienced dentists offer business advice to new CDA members (Tr. 338-39; CX-1453-D, CX-1496-B, CX-1522-B, CX-1519-G); an auxiliary recruitment program which places urgently needed dental hygienists, dental assistants, and dental lab technicians into member dentists' offices (CX-1455-C, CX-1587-Z-162, CX-1459-I, CX-1462-K, CX-1522-F-H, CX-1634-C, L, M); a program offering in-office training of beginning dental assistants (at a 25% discount) (CX-1455-C, CX-1634-G, CX-1517-B); a program which offers CDA members review and analysis of contracts which members may want to make with third-party payers, such as PPO's, capitation plans, or other dental benefits plans (Tr. 1248-49, 1175; CX-1451-A, C, CX-1483-Z-10, CX-1484-Z-23, CX-1501, CX-1503, CX-1562-F, CX-1563, CX-1571-A, F. CX-1575-C, CX-1639-B, CX-1644-B) which CDA estimates can save members hundred of dollars in attorneys' fees (Tr. 1204; CX-1563, CX-1571-A); and an annual retirement and financial planning seminar ($95 for CDA members; $245 for non-members) (CX-1487-A-B, CX-1501, CX-1502-A, CX-1525-A, CX-1575-C, CX-1459-H, CX-1486-B).

e. Peer Review

98. CDA's peer review program provides members with an easier, less costly alternative than litigation to resolve patient complaints (Tr. 291-92, 1151, 1397-98; CX-1448-D, CX-1510-A, CX-1520-A, CX-1563, CX-1571-A).

99. CDA estimates that this program's value to members if about $10,000 per incident as compared with "potentially costly, lengthy litigation" or disciplinary action by the State Board of Dental Examiners (CX-1520-A, CX-1571-A).

100. About 900-1,000 peer review cases are resolved each year (Tr. 1152, CX-1484-Z-23).

f. Scientific Sessions and Continuing Education

101. CDA sponsors two scientific sessions each year which it has described as "a premier member benefit" (CX-1488-A, CX-1520-A, CX-1571-A, CX-1489-A) and "the most visible and tangible membership benefit" (CX-1483-W).

102. CDA budgets over $1 million for these two sessions (CX-1481-Z-15, CX-1482-Z-47, CX-1483-M) not including staff salaries (CX-1652-Z-22-23), which are attended by thousands of dentists, dental auxiliaries, staff, exhibitors and guests (Tr. 1155; CX-1452-A, CX-1484-Z-27, CX-1488-A, CX-1489-A).

103. The sessions offer courses, seminars, and workshops covering scientific, clinical, practice management, and financial matters (Tr. 1156-57, 1416-19; CX-1448-D, CX-1480-D, CX-1481-Z-36-37, CX-1482-Z-29-30, CX-1483-Z-57, Z-60-61, CX-1522-F, CX-1587-Z-168).

104. Member dentists may attend these sessions free of charge (Tr. 289; CX-1483-Z-55, CX-1488-A, CX-1510-A, CX-1532-A, CX-1544, CX-1562-C, CX-1571-A, D, CX-1587-Z-166). Non-members must pay a registration fee ($855 in 1993) to attend (Tr. 1156, 289-90, 381; CX-1481-Z-44, CX-1482-Z-35, CX-1483-Z-55, CX-1488-A, CX-1504-A, CX-1587-Z-166-67, CX-1638-A).

105. The scientific sessions also offer dentists a convenient way to earn continuing education credits which are required by the State (Tr. 1157, 1160, 1397, 1195-96; CX-1448-D). This is a free, substantial benefit to members. In contrast, non-members would have to pay from $1,600 to $2,000 a year to earn equivalent credits (Tr. 290-91, 1397, CX-1448-D, CX-1462-I, CX-1562-C, CX-1571-A-D, CX-1575-D, CX-1587-Z-166, CX-1644-B).

106. Income from the scientific sessions helps to defray the costs of operating CDA, and may offset dues increases (CX-1484-N, CX-1482-L).

g. Publications

107. The official publications of CDA, the CDA Journal and CDA Update, provide CDA members with "the latest information regarding dental research, techniques and materials, as well as legal and legislative news" (CX-1571-L). The subscription rate for the Journal for members if $12; for non-members it is $60 (CX-1484). The rate for the Update is $6 as compared to $24 for non-members (CX-1480-B).

108. CDA has stated that, "[b]y providing its readers with the latest in scientific and practice management information, the Journal keeps CDA members on the leading edge of technology and dental care" (CX-1575-C).

h. Benefits Provided Through For-Profit Subsidiaries

(1) TDIC

109. TDIC's purpose is to provide "stable, reasonable professional liability insurance for CDA member dentists . . . ." (CX-1472-A). In California, insurance is offered only to CDA members (Tr. 1785; CX-1587-Z-74). CDA has estimated the annual "value to member" of this coverage at over $1,000 (CX-1520-B). And, according to CDA's

Executive Director: "If TDIC were not in operation, it is an absolute certainty that the kinds of liability insurance costs would have continued to rise and never stabilized the way they have" (CX-1587-Z-84).

110. CDA also provides, through TDIC, state-required liability insurance to candidates for the California, Nevada, and Western Regional dental licensure examinations (CX-1490, CX-1491-A-B, CX-1501, CX-1522-B, CX-1525-B, CX-1526-C, CX-1544, CX-1649-Z-21-22). This insurance is free of charge to CDA members; it is not available to non-members (CX-1501, CX-1544, CX-1649-Z-1).

111. TDIC provides professional liability insurance for over two-thirds of actively practicing CDA members (CX-1478-G, CX-1480-A, G, CX-1484-Z-30).

112. TDIC has paid dividends and made other payments to CDA which contribute to a stable dues structure and keep dues lower than they might have been (Tr. 1413-14, 1189-90, 1769, 1785).

(2) TDCIS

113. TDCIS' stated purpose is "to serve as broker and administrator for various insurance programs provided for CDA members" and "to provide the finest insurance programs at competitive rates for eligible CDA members, their families and employees" (CX-1472-A, CX-1475-D).

114. TDCIS insurance plans are available only to CDA members (Tr. 1782, 1792; CX-1509-A-B, CX-1532-A, E) and, in some cases, the members' spouses and staff, and to CDA component dental society employees (CX-1558-A, F, CX-1575-G).

115. TDCIS has more than 13,000 policyholders, more than 30,000 individual policies in place, and bills and collects more than $55 million a year (Tr. 1782-83;

CX-1484-W, Z-25, Z-29). Moreover, "each policy purchased by a CDA member contributes to the net income of TDCIS, which ultimately provides dividends to CDA" (CX-1484-Z-29).

(3) TDC

116. TDC's purpose is to provide and broker a wide range of high-quality services and products to CDA members at competitive fees with net profits to ensure its growth and to support CDA's activities (CX-1448-C, CX-1472-A, CX-1484-Z-29, CX-1546-B, CX-1562-D, CX-1571-J, CX-1637-D). These services are available only to CDA members (Tr. 1792; CX-1509-A-B).

117. The services and products provided by TDC include: a revolving line of credit of up to $5,000 to patients of CDA members (CX-1455-K, CX-1476-F, CX-1484-Z-29, CX-1570-D, CX-1571-J, CX-1587-Z-95-96). This "valuable service" was used by 1, 042 dental offices as of March 1993 (CX-1484-Z-29); dental equipment financing (Tr. 1780; CX-1479, CX-1570-C, CX-1571-J); special discounts on U.S. Sprint long distance telephone services (CX-1460-G, CX-1484-Z-29, CX-1570-F, CX-1571-J); "reduced cost printing services" (CX-1521, CX-1563); a home mortgage program which shortly after being offered, received over $30.8 million in applications (Tr. 1778-79; CX-1476-G, CX-1480-G, CX-1570-E, CX-1571-J, CX-1651-Z-40); a VISA gold card issued by Marine Midland Bank (Tr. 1779; CX-1480-K, CX-1484-Z-29, CX-1570-E, CX-1571-J, CX-1572-A-B, CX-1651-Z-40); and, automobile leasing services (Tr. 1780; CX-1480-K, CX-1484-Z-29, CX-1570-D, CX-1571-J). These services are used by a substantial number of CDA members (CX-1479-P, CX-1484-Z-29).

118. TDC has paid dividends to CDA which help maintain a stable dues structure and keep membership fees lower than they otherwise might have been (Tr. 1769, 1413-14, 1189-90). TDC's substantial payments to CDA ($5

million) have materially improved its financial position (CX-1483-Z-15, CX-1484-Z-29, CX-1546-B, CX-1637-D).

i. ADA and Local Component Membership

119. CDA membership carries with it membership in the ADA and local component societies which offer additional worthwhile programs for members.

120. There are many benefits to membership in ADA. These include: a home mortgage program; professional liability insurance coverage; advice about dental benefits programs and alternative deliver systems; a contract analysis service; credit cards for personal and business use; credit union membership; group life and health insurance; an equipment leasing program; long distance telephone discounts; a practice financing program; the "Health Cap Card," providing credit for dental patients; an antitrust law brochure; ADA's Annual Session; national dental health promotions; audiovisual education and training materials; dental product evaluation programs; legislative representation; the Journal of the American Dental Association and the ADA News newsletter; toll-free access to the world's largest dental library; a health screening program for members; public relations activities that enhance the image of dentists; and, practice management information (CX-1574-A-B, CX-1639-A-M, CX-1649-Z-38-53, CX-1563). ADA membership benefits also include a peer review system (Tr. 1228), and services designed to help dentists run, and become efficient in the administration of, their dental p[illegible]ices (Tr. 1227-28, 1246). ADA also offers publications [illegible] "Building Successful Associateships," "Successful Valuation of a Dental Practice," and a "Directory of Dental practice Appraisers and Valuators" (CX-1493, CX-1524-O, CX-1568-C), and advice regarding the Americans With Disabilities Act and its effect on the dental office (CX-1468-F). CDA has touted many of the above-listed programs, services, and activities of ADA as beneficial

to CDA members (CX-1521, CX-1563, CX-1571-A, CX-1575-C, CX-1648-A).

121. Membership in local component societies also carries with it several benefits: referral services, provided at no charge to members (CX-1471-C, CX-1563, CX-1565-B, CX-1571-L), which can save them thousands of dollars a year in fees which would otherwise be paid to commercial referral services (CX-1563, CX-1565-B, CX-1571-L); emergency referral services which can help new dentists increase their patient base and build their practices (CX-1560, CX-1626-B, CX-1653-F); component "study clubs" which assist new CDA members in learning some of the skills of practice management which are not taught in dental schools (Tr. 337-39; CX-1400-L). In addition, component continuing education courses are often offered at no charge to members (CX-1626-A), or at lower rates than are available to non-members (CX-1277-F, CX-1538-B, CX-1563). CDA has touted all of these programs and services as being beneficial to its members (CX-1499, CX-1521, CX-1563, CX-1571-L, CX-1648-A).

122. Finally, tripartite membership enhances a dentist's reputation and undoubtedly attracts customers who believe that membership in a professional organization is an indication of competence (see Tr. 1679, 1407, 1653, 1844, 287, 384; CX-789-B, CX-880-A).

D. CDA's Charitable Activities

123. Dr. Dale F. Redig, CDA's executive director, testified about CDA activities which improve the health of the public and promote the art and science of dentistry (Tr. 1136):

> CDA has supported legislation promoting fluoridation, clarifying regulations and legislation related to OSHA standards, and has supported steps to increase compensation to California dentists under the Denti-Cal Medicaid program. After a series of court actions,

> Denti-Cal's reimbursement level is about 60 to 65% of the usual, customary and reasonable fees (Tr. 1143-45).
>
> CDA supports infection control and the Dental Patient Bill of Rights, which promotes the welfare of dental patients in California (Tr. 1145-47).
>
> CDA seeks adequate dental prepayment systems which encourage the public to use dental care regularly (Tr. 1145).

124. CDA has supported legislation which benefits the public, even though it may be opposed by its members.

125. These programs include encouragement of fluoridation (Tr. 1360), increased training requirements for the use of conscious sedation (Tr. 1294), opposition to proposed laws that patients be tested for AIDS (Tr. 1297), opposition to "informed consent laws" concerning amalgam fillings (Tr. 1299), and, encouragement of legislation to curtail smoking (Tr. 1293).

126. CDA's Council on Scientific Sessions promotes, for the benefit of the public, advances in dentistry by sponsoring scientific presentations (Tr. 1155-56).

127. CDA has disaster and relief funds which help member and non-member dentists who are in desperate financial need because of illness or disaster (Tr. 1167).

128. Dr. Martin Craven, President of CDA and a former member of the AMA, testified that the public service aspects of AMA and CDA are not comparable and described AMA, in contrast, as a mere political organization interested in accumulating wealth whereas CDA's focus is on improving the dental health of the citizens of California (Tr. 1402). In his opinion, the major purpose of CDA's activities is to benefit the public (Tr. 1431).

E. CDA's Advertising Policy

129. As a condition to CDA membership, a California dentist must subscribe to, adhere to, and be bound by its Code of Ethics and Bylaws (CX-1450-E, CX-1258-E).

130. CDA's Code states:

> [a] member may be disciplined for unprofessional conduct as it is defined by the Dental Practice Act, and for violation of any law of the State of California relating to the Practice of Dentistry (CDA Code § 5) (RX-64-A).

131. In a press release issued after the complaint in this matter was issued, CDA confirmed that its ethical rules govern members' conduct:

> CDA, which represents about 70% of the state's dentists, requires that members follow the law and the organization's code of ethics. The association enforces compliance; violations can result in expulsion (CX-1442-B).

132. CDA's components have agreed with it that the ethical rules which it establishes, including advertising rules, shall be the rules by which all members are governed (CX-1263-B, CX-1281-S, T, CX-1290-C, CX-1315, CX-1410-A).

133. Section 10 of the CDA Code establishes the standard which its members' advertising must satisfy:

> Although any dentist may advertise, no dentist shall advertise or solicit patients . . . in a manner that is false or misleading in any material respect. . . . (RX-64-B).

134. In addition to the Code's standard, CDA relies on California law (which is incorporated into the Code), the regulations of the Board of Dental Examiners, and on

sections of the Business and Professions Code (Tr. 1082; RPF 60; RX-136-A-E) to provide advertising standards which it enforces through the Judicial Council (RPF 66-69).

F. Reasons For CDA's Advertising Policy

135. In 1976, CDA's president noted that:

> [d]entists as a whole are in a position now where they can determine their own fees and treatment modalities without being overwhelmed by market pressures, regulated profits, etc.

136. He then warned that:

> [If CDA does not survive] we [will] all end up in a frenzied competition for patients on the basis of fees alone . . . It comes down to the potential of each of us being pitted against each other, for fees, to attract patients, and eventually dental care would be downgraded (CX-1623-A-B).

137. This aversion to competition has continued. For example, in December 1987, the executive director of a component, in forwarding an advertisement to CDA, stated:

> This dentist is not in our area, Glendora is in the San Gabriel Valley component; however, if you wish me to handle this, I would be happy to do so, Italian style!!! Just let me know. These Drug Store Ads make me sick (emphasis in original) (CX-547).

138. In 1988, referring an advertising matter to CDA, one of its component members stated: "[m]uch of the advertising is in newspaper/flyer type. Perhaps [dentists] would be willing to change or stop this type of advertising" (CX-941). Also in 1988, the editor of a component newsletter stated:

> The ethical code . . . discourages the advertising of superior services lest we return to the days when unscrupulous operators defamed the dental profession for personal gain (CX-1392-B).

139. In 1989, the president of another component, writing in its newsletter, generally disparaged advertising and warned members against individual advertising, noting, among other things, that because of a "busyness" crisis (a term coined by CDA in referring to dentists' complaints that they did not have enough business) many dentists had begun to advertise:

> I am increasingly disturbed at not only the degree but the nature of advertising occurring in our profession today . . . [A 1978 study found that the group] most likely to seek the services of an advertising dentist is a large family headed by a male with an annual income lower than $15,000 (1978) and a strong belief that dental fees are too high. Is this the type patient you want to make up your practice?
>
> The patients responding to advertising are, according to [other] studies, already "on and off" patients that drift from practice to practice with little or not loyalty or bond to their doctor. . . . If the shining image of dentists is tarnished by aggressive advertising we may be viewed as wholesale tradesmen rather than honored professionals (CX-1359-B).

140. In 1994, Dr. Quint, an Ethics Committee Chairman, testified that he conducts what he calls an "indoctrination meeting" with new members of his component (CX-1608-V); at this meeting, Dr. Quint advises:

> Then I say does advertising pay. I say it is not cheap. The PennySaver costs -- If you want to send out a list of PennySavers for everybody. I don't know what it is right now but it used to be about $1500 for a postal zone. That's expensive. Telephone books is about $500

> for a half a page, $500 a month. Fliers, you can take them to patients' houses and leave them on their door. I have one dentist that did that and he got no patients whatsoever out of it. People just do not go to the dentist because they see a flier. That's my opinion.
>
> What kind of patients do you get when you advertise? You get coupon clippers, one-timers, nonrefers, and your old patients then will say how come I don't get the deal. How come you can't give me a discount? Here's my coupon. I know that from experience of having a person in my office who did advertise (CX-1608-Z-1).

G. Enforcement of CDA's Advertising Policy

1. Dissemination of Policy

141. CDA includes its Code of Ethics in materials it provides to new members and applicants and they receive a copy of the Code annually (CX-1244-A, CX-1608-X).

142. CDA also furnishes articles concerning advertising enforcement to its components for inclusion in their newsletters and distributes copies of its Advertising Guidelines and Code to participants in its ethics workshops (Tr. 1437-38; CX-1219-B, CX-1161-A-E, CX-1244-A, CX-1248-H).

143. CDA also sends copies of its Code to non-members, such as dental schools, who it believes can assist it in enforcing the Code's advertising policy (Tr. 884; CX-1198, CX-1219-B, G, CX-1248-H, CX-1606-F, CX-1607-F, CX-1608-F, Z-35-37, CX-1214-B, CX-1367-A).

2. Review of Advertising

144. Applicants for CDA membership are required to submit copies of their advertising and advertising by employers and associates (TR. 685; CX-1431-B).

145. Components considering applications for membership list applicants' names in their newsletters and ask that members send them information regarding ethical problems of which the members are aware (CX-1333-D).

146. At the behest of CDA, many components review yellow pages advertising every year to discover possible Code violations (Tr. 472-73, 932-33; CX-1243-D, CX-1253, CX-1268, CX-1283-H, CX-1292; CX-1305-G, CX-1324-C, CX-1338-B, CX-1342-B, CX-1352, CX-1361-B, CX-1371-A-B, CX-1378-B, CX-1404-F, CX-1413, CX-1446-H, CX-1577-Y-Z-2, CX-1608-Z-11-12, CX-1610-V, CX-1611-Z-7).

147. CDA requires that members who enter into settlement agreements to modify or terminate existing advertising submit future advertising for review and prior approval (see, e.g., CX-57-C-D). CDA and its components require applicants who have been granted conditional status to submit advertising for review and prior approval for one year (CX-52-B).

148. CDA requires its components to check the advertising of straying members (Tr. 1354, 931; CX-1195, CX-699, CX-1371-A-B), and some members who have complained about another's advertising have monitored future advertisements for compliance (Tr. 931).

3. The Enforcement Role of CDA and Its Components

149. CDA and its components have agreed to procedures for enforcing the Code's advertising rules: the components undertake an initial investigation into charges of Code violations and, where possible, resolve the matter at the local level (CX-1579-Z-6-7). One component ethics committee chairman stated that the committees are "agents of liaison between [CDA's] Judicial Council and the members of [the component], to monitor the ethical practice of

dentistry" (CX-1403-E) (see also Tr. 507, 854, 1355; CX-1610-Z-37).

150. When reviewing questioned advertising, component ethics committees take into account CDA's instructions (Tr. 1339-40), and CDA, in some cases, monitors components' advertising enforcement (CX-478-A-B).

151. Components usually follow CDA's advice on advertising issues (Tr. 854-55, 1355; CX-177-Z-4, CX-1608-Z-7, Z-37, Z-45-46).

152. CDA and its components have agreed that when the components cannot decide whether a particular advertisement violates the Code or when local efforts at resolving advertising issues fail, the matter will be referred to CDA (Tr. 1441; CX-1260, CX-1577-Z-9, CX-1579-Z-6, CX-1603-Z-22).

153. If, during the initial investigation, a member's advertising is questioned, the ethics committee looks into the matter. If an applicant's advertising is questioned, the membership committee begins an investigation (CX-642, CX-969-A, CX-1243-D).

154. In come components, questioned advertising is reviewed by the ethics committee as a whole; in other components, an individual committee member handles such matters (Tr. 479-80, 847-48, 927-28).

155. When a component finds that an applicant's advertising violates CDA's Code, it tries to settle the matter by contacting the applicant and asking that he modify or discontinue the advertising (Tr. 690-91; CX-1606-Z-5-6).

156. If the component fails to resolve the matter, or is not certain that the advertisement violates the Code, it forwards the application to CDA's Membership Application

Review Subcommittee ("MARS") for resolution (Tr. 1023; CX-1409-E, CX-1603-Z-24-25, CX-1606-Z-8).

157. MARS is a subcommittee of CDA's Judicial Council which reviews membership applications to ensure that applicants have complied with CDA's ethical rules (Tr. 1023, 1440; CX-1219-A, CX-1259-B, CX-1484-Z-27-28).

158. After MARS has decided whether an advertisement does or does not violate the Code it makes a recommendation to the referring component. Recommendations include: full membership; acceptance with counseling; "conditional applicant status"; or, denial of membership (Tr. 1026-29; CX-118-B, CX-248-B, CX-1589-S-T, CX-1026, CX-1608-Z-8-9, CX-1606-Z-8-9, CX-1609-Z-3).

159. In one of its recommendations concerning an application, CDA told the component:

> Pursuant to action taken by CDA's Board of Trustees in December 1980, CDA will extend financial assistance in the event litigation ensues from the component's membership decision only if the component: 1) follows the recommendation of the MARS; and 2) advises the applicant of its membership decision within six months of the date of this letter. (See, e.g., CX-864-B).

160. Until about 1985, CDA denied membership to any applicant who advertised in a manner that violated CDA's advertising rules (CX-1215-A), and the applicant was invited to re-apply in one year (see, e.g., CX-1058-C).

161. Beginning in about 1986, CDA established a membership category that it refers to sometimes as "conditional applicant" status and sometimes as "pending member" status (see, e.g., CX-993, CX-1243-U). This status was originally designed for first time applicants who were new graduates (within two years of graduation) (CX-1416-E). It can only be granted once, for a one-year

period (CX-1243-U), and only CDA (through MARS) can approve this status (CX-1178-A).

162. "Conditional applicant" status is available solely to dentists whose advertising violates CDA's Code, and who are unable to correct the advertising immediately. It is granted only to applicants who agree to correct the advertising in question as soon as possible, and to cease using the improper advertising representation (CX-1178-A).

163. Dentists who are "conditional" applicants do not receive the benefits of full membership; for example, they may not hold office or advertise that they are members of CDA or ADA (Tr. 1027; CX-1243-U). Moreover, they do not have the right to a Judicial Council trial if they do not agree with the subsequent re-evaluation of their advertising (CX-1243-U).

164. Conditional applicants are given one year to bring their advertising into conformance with CDA's Code (CX-1243-U). At the end of the one year period, the component conducts an inquiry into whether the conditional applicant has brought his or her advertising into compliance, and reports its finding to CDA (CX-1243-U). A conditional applicant is either granted full membership in CDA or dropped from membership at the end of the year depending upon whether he or she has made the changes required by CDA within that time period (CX-1243-U).

165. Beginning in about 1990, MARS began granting full membership to applicants who advertising was objectionable with the caveat that the component, whose real purpose is to obtain correction of objectionable advertising, "counsel" the dentist regarding such advertising (see, e.g., Tr. 1028-29, 1522-23; CX-375-C, CX-478-A-B, CX-866-A, CX-1613-A). In such instances, CDA or the components first ensure that the applicant is willing to change, or has changed, the objectionable advertising (see, e.g., CX-444-B, CX-648-A, CX-914-B), or that the component has received written assurance that the dentist will comply with CDA's

Code (see, e.g., CX-856-A-B). For example, in one recommendation to a component to accept and counsel an applicant, CDA emphasized that:

> [CDA's recommendation of acceptance with counseling] is contingent upon [the applicant's] willingness to comply with your committee's requests in accordance with CDA's Code (CX-648-A).

166. In other recommendation, CDA advised a component:

> Before MARS can recommend acceptance of Dr. Nicholl's application, it requires written assurance from Dr. Nicholl's [sic] that she will make the recommended changes contained herein, and ensure any future advertisements published on her behalf comply with the Dental Practice Act and the CDA Code (CX-775-B).

167. CDA informs applicants who are denied membership that they may reapply in one year or when the offending advertising is correct (see, e.g., CX-826).

4. Advertising Claims That CDA Has Restricted

a. Price Advertising

(1) Representations of Low Price

168. Advisory Opinion No. 3 to Section 10 of CDA's Code prohibits references to the cost of a dental service unless the representation:

> is exact, without omissions . . . [makes] each service clearly identifiable, without the use of such phrases as "as low as," "and up," "lowest prices" or words or phrases of similar import (CX-1484-Z-49, Z-50).

169. At various times (1988, 1990, 1991, 1993) some of CDA's constituents warned members about using "terms that

mislead" such as: "affordable" (CX-1363-C); "from," "between," "and up," "lowest prices" or any other implication of "bargains" (CX-1406-C); "affordable" or "reasonable" (CX-1318-B); comparative statements such as "from," "between," "as low as," "lowest prices" (CX-124-57-E); and, words such as "reasonable," and "lowest" (CX-1391-B).

170. Several component ethics officials testified that low price references are objectionable without regard to whether they are false or misleading (CX-1610-Z-12-13, CX-1608-Y) (see also Tr. 1738, 703, 716, 944-45; CX-1580-Z-33).

171. From 1982 to 1993 CDA and its components warned members about the use of low price claims. For example, CDA recommended denial of an application because the applicant's use of the phrase "affordable family dentistry" was unverifiable and therefore inherently misleading:

> Since there is no basis of comparison or knowledge upon which Dr. Hibbard could conceivably base his opinion that his fees are "affordable," this statement is false or misleading (CX-445-A).

172. In 1986, CDA recommended denial of an application, in part, because the applicant included in advertising the phrase "affordable dentistry" on the basis that it "implies Dr. Gyaami is offering lower fees than other practitioners, or that he is offering a 'bargain'" (CX-408-B) (see also CX-306-A, CX-391-B, CX-605-B).

173. Appendix E of complaint counsel's proposed findings lists exhibits in which CDA restricted representations of low prices without regard to whether the claims were truthful and nondeceptive. See also CX-1659-Z-42-48 which lists the various phrases used by its members to which CDA has, at one time or another, objected.

(2) Representations of Discounts

174. Without regard to whether discount advertising is false or misleading, CDA requires that discount offers include five disclosures: (1) the dollar amount of the non-discounted fee for the service; (2) either the dollar amount of the discounted fee or the percentage of the discount for the specific service; (3) the length of time, if any, the discount will be honored; (4) a list of verifiable fees; and (5) identification of specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount (CX-1262-I).

175. Since as far back as 1983, and continuing through 1993, CDA and its components have objected to across-the-board discounts (discounts on each service provided) that do not include at least the regular fee for each discounted service:

> Sr. Citizen Discounts (1982)
> (CX-753-A) (Dr. Mowery)
>
> discount for cash; senior/family discounts (1989)
> (CX-806) (Dr. Ghatnekar)
>
> 20% senior discount; 20% military discount (1991)
> (CX-684-A) (Dr. McGreevey)
>
> Senior citizen and military discount (1992) (CPF 894)
> (CX-926) (Dr. Scott)
>
> sr. citizen discounts; 40% off our regular prices for any treatment; excludes orthodontics; offer expires 3/15/93 (1993) (CPF 921)
> (CS-467-B-C) (Dr. Iskaq)
>
> discount for all new patients (1993)
> (CX-387-A) (Dr. Ghadimi)
>
> senior citizen/military/student discount (1993)

(CX-333-A, F) (Dr. Dorotheo).

176. A number of component ethics committee chairmen, as well as the current Chairman and a former chairman of CDA's Judicial Council, testified that across-the-board discount offers that do not include at least the regular fee for each discounted service, are objectionable without regard to whether they are, in fact, false or misleading. For example, Dr. Nakashima testified that dentists cannot advertise, without the required disclosures, across-the-board discounts such as "senior citizens discount," and "discount for all new patients," even if the claims are true, and even if the advertiser has appropriate substantiation (Tr. 1742-43). (See also, Tr. 1064, 1067; CX-1577-Z-20-21, CX-1606-Z-20, CX-1608-Z-32).

177. One of CDA's components warned its members that its discount advertising requirements came close to a ban on discount advertising:

> [T]he CDA Code of Ethics information requirements are nearly prohibitive - fees, %discount, length of time, etc. (CX-42, CX-589, CX-972).

178. In 1988, one of CDA's components made the same point:

> The first mistake is advertising a discount. This is against ethical practice in the State of California. The second mistake, is advertising a discount fee without advertising the original fee (CX-806-A).

179. Dr. Miley, who was put on trial by CDA for our objectionable advertisements, testified that CDA's discount advertising rules effectively preclude across-the-board offers because, in order for a dentist to advertise in compliance with CDA's rules, he would have to include the regular fee for one hundred to three hundred different procedures. He concluded: "even though everybody said at the trial it was

legal to advertise, the fact is you couldn't and meet their guidelines" (Tr. 360-61).

180. Dr. Kinney, a current member of CDA's Judicial Council, testified that literal application of CDA's discount advertising rules would not make sense:

> [T]hat kind of ad would probably take two pages in the telephone book [and] [n]obody is going to really advertise in that fashion (Tr. 1372).

181. Dr. Cowan, a component ethics committee chairman, testified:

> We wouldn't expect someone to list the prices of each and every service. Do you realize how many services there are that a dental office provides? . . . I mean, that would be totally unreasonable to expect them to list every single fee and the amount of the discount (Tr. 1593-94).

182. Appendix D to complaint counsel's proposed findings lists exhibits in which CDA restricted discount claims without regard to whether the representations were truthful and nondeceptive. See also CX-1659-Z-27-40 for a list of documents which reveal that, at one time or another, CDA has objected to discount claims by its members.

b. Non-Price Advertising

(1) Quality

183. In 1982, CDA informed its members that quality claims in advertising violated the Code of Ethics (CX-1228-A), quoting Advisory Opinion No. 8 to Section 10 of the Code which is still in effect:

> Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly,

> such claims are likely to be false or misleading in a material respect (CX-1484-Z-50).

184. A checklist used as recently as 1992 by one of CDA's components to inform members that their advertising violated CDA's Code included in a list of categories of phrases under the heading "Prohibitions":

> use of words relating to quality of performance such as "high level," "fast results," and "progressive" (see, e.g., CX-731-A).

185. In October of 1993, one of CDA's components warned its members in an "ETHICS UPDATE" that they should not use the term "quality" in advertising ("DON'T: Use terms that mislead: i.e., 'quality' . . .") (CX-1363-D).

186. A number of component ethics committee chairmen testified that advertisements that include the word "quality" are objectionable without regard to whether they are, in fact, false or misleading:

> The use of the work quality in any form is misleading because it's nonspecific and it implies superiority (CX-1610-Z-23);
>
> The use of the word quality and perhaps the use of the word gentle are two unverifiable and unsubstantiable terms (CX-1610-Z-28);
>
> Q On the occasions that a dentist would use the word "quality" in advertising, would you consider that an unacceptable superiority claim?
>
> A I think the little blurb on advertising guidelines suggest that you don't use "superior quality" as an advertisement (CX-1577-Z-36-37).

(See also, Tr. 706; CX-1608-Z-42 (quality claims are objectionable "because there is no way to prove it")).

187. In 1993, one of CDA's components objected to an applicant's use of the phrase "quality care for less" but did not make any request for substantiation, and made no inquiry into whether the claim was in fact false or misleading; the component simply stated its objection, and directed the dentist to correct the advertising and to acknowledge, by checking a form supplied to him by the component, that he either had "discontinued" the advertising or "will alter or have altered the advertising to conform to" CDA's Code (CX-366-A, B).

188. In 1993, one of CDA's components objected to an applicant's use of the phrases "render personal quality dental care," and "providing you with the best in treatment" on the basis that "quality services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in a material respect" (CX-120-B).

189. In 1989, CDA notified a dentist that his advertising violated the Code since "you are advertising that your dental office provides superior dental services" because of these statements:

> We believe quality in dentistry is never an accident. It is the result of caring, effort, and wise decisions. ("Implies that other dental offices do not put as much effort, care, etc., into achieving and providing quality dental services as your dental office.") (CX-868-A).
>
> [W]e cater to those people that demand quality, personal attention, and punctuality. ("Implies other dental offices do not cater to patients with these demands.") (CX-868-A).

190. In 1986, CDA recommended denial of an application because, among other things, the applicant had advertised "claims as to the quality of services that are not susceptible to measurement or verification":

> gentle dentistry team;
>
> gentle, caring dental team
>
> the dedicated professional . . . at Silver Ridge
>
> quality dentistry with a touch of tenderness
>
> quality dentistry in a pleasant and positive manner
>
> the sensitive hygiene team
>
> leading edge technology
>
> you shouldn't have to wait hours or days for dental care. The team at Dr. Reid's is ready to help when you need them (CX-846-A-B).

191. In 1982, CDA notified one of its components that one of its members' advertising was objectionable because, among other things, it included a claim of quality: "we make the finest dental care easy for you" (CX-107-A). CDA did not direct the component to request substantiation for the claim, or to make an inquiry into whether the claim was in fact false or misleading; rather, it simply directed the component to request that the dentist "delete the word 'finest' from future advertisements" (CX-107-A).

192. In responding, the component ethics committee chairman stated:

> It was very difficult for Dr. Brown to understand why words like quality and finest were in violation and I can see his point of view (CX-108-A).

193. Appendix F to complaint counsel's proposed findings lists exhibits in which CDA restricted quality claims without regard to whether the representations were truthful and nondeceptive. See also CX-1659-Z-50-59 for a list of

documents which reveal that, at one time or another, CDA has objected to quality claims by its members.

(2) Comparative and Superiority Claims

194. In 1982, CDA informed its members that claims of superiority violate the Code (members should avoid the "implication of superiority") (CX-1228-A). In that same year it warned its members to avoid claims that imply professional superiority (for example, "comfortable") (CX-1229-A).

195. In 1988, the editor of a component newsletter advised its members that:

> The ethical code . . . discourages the advertising of superior services lest we return to the days when unscrupulous operators defamed the dental profession for personal gain (CX-1392-B).

196. In 1991, one of CDA's components warned its members:

> You must avoid any inference of superiority, such as "high level," "progressive," "fast results," "modern," "latest," "new," etc. (CX-1406-C).

197. Other components warned members about the use of superiority claims:

> The general message is that the advertisement to the general public may not be deceptive or show superiority over other practices (CX-1629-B) (in 1993).
>
> Superiority claims in any form will guarantee problems with the California State Board and the CDA (CX-1363-C-D) (in 1993).

one of the "two most common mistakes" in advertising is:

> using words that imply superiority of service, i.e., "newest," "latest," or "progressive" (CX-1627-F) (in 1993).

198. A number of component ethics committee chairmen, as well as a former chairman of CDA's Judicial Council, testified that they object to all statements that they believe imply that the advertising dentist is superior to other dentists, regardless of whether the claims are, in fact, false or misleading:

> [phrases that] impl[y] an essence of superiority by [the advertising dentist] as in relationship with the dentists . . . violate [CDA's] Code of Ethics (CX-1610-Z-12).
>
> I don't think you can legally advertise, that you are superior to anybody else. . . . You can't imply superiority (CX-1608-Z-15).
>
> And how in heaven's name does any member of the public ever verify that [a dentist's service] is actually superior? (CX-1579-Z-13).

(See also Tr. 691-92, 716; CX-1580-Z-4); Tr. 880 (superiority claims are objectionable because they can never be substantiated); Tr. 938 (claims that imply superiority, such as "I am more gentle than other dentists in my area" are objectionable because such claims "may be very hard to verify"); Tr. 1030; CX-1577-Z-13-14, CX-1603-Z-31-32, Z-62 (superiority claims are "absolutely" objectionable).

199. In 1983, CDA recommended denial of an application for membership on the basis that, among other things, the applicant used a phrase ("we care") that violates CDA's Code because the phrase "implies superiority, or that Dr. Hibbard cares more than another dentist" (CX-449-A).

200. In 1986, one of CDA's components notified an applicant that his advertising violated CDA's Code because, among other things, it included the phrases "new improved," "a visit to your dentist needn't be unpleasant," "my number one concern is your care and comfort" because:

> These statements imply that one is professionally superior to other practitioners or that one is pleasant while others are not; that one is concerned where others are not; or that one has some "new" and better technique available (CX-238-A).

201. The record reveals many other instances in which CDA, a component, or an ethics committee member objected to quality or superiority claims because they implied that other dentists did not provide the same quality service:

> You'll appreciate our warm personal attention (CX-978-A) (in 1988)
>
> State of the art dental services (CX-1026-A) (in 1992)
>
> gentle (CX-467-A) (in 1993)
>
> gentle, painless (CX-24-A) (in 1993)
>
> caring dentistry (implying that [the dentist] cares, implies that others don't, perhaps) (CX-1610-Z-32-33)

202. In another case, CDA advised a member that this advertising was objectionable because the claim "you will find our reputation is impeccable" "implies that other dental offices do not have impeccable reputations" (CX-868-A-B, CX-626-A).

203. Dr. Kinney testified that a representation would be an objectionable superiority claim if the dentist is "claiming that they have something that sets them apart from the rest of the profession, that no one but themselves has the ability to

either utilize this technique or understands it well" (CX-1578-Z-17).

204. Appendix G to complaint counsel's proposed findings lists exhibits in which CDA restricted superiority claims without regard to whether the representations were truthful and nondeceptive. See also CX-1659-Z-61-71 for a list of documents which reveal that, at one time or another, CDA has objected to superiority claims by its members.

(3) Guarantees

205. Quoting state law, CDA has, as a practical matter, barred the advertising of guarantees by its members without regard to whether the offers are false or misleading. See e.g., CX-1017-A in which CDA, asserting that state law "prohibited" guarantees, stated:

> Any violation of state law related to the practice of dentistry or unprofessional conduct as defined by the Dental Practice Act renders members liable to disciplinary action by the association according to Section 5 of the CDA Code of Ethics.

(See also CX-98-A, CX-354-A, CX-557-C-D, CX-497-C, CX-391-C, in which CDA made similar statements about member's advertisements, ignoring the fact that state law permits truthful, nondeceptive offers of guarantees (RX-137-B [1680(1)], RX-138 [651 (L)]).

206. The record contains many examples of CDA's objections to members' advertisements which offered or, according to CDA, implied a guarantee:

> Our 15 year reputation is your assurance of personal satisfaction (CDA: "[i]n this context, the word 'assurance' is synonymous with the word 'guarantee'") (CX-644) (in 1985).

removable braces that can straighten your smile in as little as 6 months (CDA: "May imply Dr. Moga is guaranteeing a dental service") (CX-740-C) (in 1985).

we guarantee our work (CX-22-B) (in 1985).

satisfy your dental needs, or we will refund your money (CDA: [phrase] appears to be a guarantee for dental services) (CX-98-A) (in 1987).

Ask about guarantee (CX-274-C) (in 1992).

we offer the safest and most painless (CX-1000-C) (in 1992).

outstanding success rates (CX-354-A) (in 1992).

sure fit, comfortable dentures (CX-495-A) (in 1992).

crowns and bridges that last (CX-497-C) (in 1993).

we guarantee satisfaction (CX-484-B, D) (in 1993).

207. Several component ethics committee chairmen and a former Judicial Council chairman expressed their opposition to offers of guarantees without considering whether they are false or misleading:

> I don't think you ought to be saying you guarantee something (CX-1577-Z-14).
>
> Q In your opinion, does an advertisement that offers a guarantee, whatever the guarantee is, violate CDA's Code of Ethics?
>
> A I would say anything about a guarantee, yes . . . (Tr. 1047).

See also Tr. 937, 1456-57, CX-1603-Z-49, CX-1606-Z-15, CX-1611-Z-36.

(4) Consumer Anxiety

208. In 1984, one of CDA's components objected to an applicant's use of the phrase "gentle, quality care" (CX-799). The component advised the applicant that before his application could be completed, he would need to submit a written statement agreeing to cease using this phrase "and other terms which violate" CDA's Code (CX-799).

209. In 1983, CDA objected to a member's advertising because it included, among other things, the phrase "special treatment for nervous patients" (CX-367-B).

210. In 1985, CDA objected to advertising by an applicant's employer because it included, among other things, the phrase "special care for cowards" (CX-608-A).

211. In 1986, one of CDA's components notified an applicant that his advertising violated the Code because it included, among other things, the representations "a visit to your dentist needn't be unpleasant," and "my number one concern is your care and comfort" (CX-238-A).

212. In 1988, one of CDA's components objected to a member's advertising because it included, among other things, the words "sensitive" and "caring" (CX-761).

213. In 1991, one of CDA's components notified a member that is advertising did not conform to the Code because it included, among other things, the phrase "provide you with special service and comfort" (CX-684-A).

214. In 1992, one of CDA's components objected to an applicant's advertising because, among other things, it included the use of words relating to apprehensions of patients ("gentle dental care") (CX-767-A).

215. In 1993, one of CDA's components objected to an applicant's advertising because, among other things, it included the word "gentle" (CX-467-A).

216. Appendix C to complaint counsel's proposed findings lists exhibits that reflect CDA's restrictions on representations addressing consumers' fears and anxieties concerning dental care.

5. Materiality & Falsity

217. When CDA or its components analyze members' advertising claims, they purportedly apply the "false or misleading in a material respect" standard (CX-1484-Z-49); however, they have ignored this standard in some cases by overlooking the importance which challenged claims might have to consumers.

218. CDA and its components have objected to advertising to which, they assert, no one pays attention. For example, Dr. Quint testified:

> When you use misleading statements, many people will say that's just a misleading statement and just don't pay any attention to it. That's why we tell our members don't bother using misleading statements because they are against the law and nobody pays any attention to them anyway (CX-1608-Z-19).

219. Dr. Lee, currently a member of CDA's Board of Trustees (Tr. 1007-09), testified that while he does not know whether discounts are important to consumers, discount offers violate CDA's Code if they do not include the regular fee for each discounted service (CX-1589-I, Z-48-49) (see also CX-1577-K-L, Z-2-3).

220. CDA and component officials charged with enforcement of the Code's advertising restrictions have, in several cases, equated the "material respect" standard with "misleading." An example of this approach is expressed in a component's 1990 newsletter:

> Interpretation of "material respect" is a matter of degree. If an ad is obviously and demonstrably false or misleading, then it must also be false in some material respect. If an ad contains only slight misrepresentations of fact that would not deceive a prudent person, then the "material respect" rule has not been violated (CX-1252-C).

221. In trial testimony, Dr. Lee defined "material respect" as "[w]ould someone be misled reading the advertisement" (CX-1589-Z-30), as "[s]omething that I guess you can put substance to" and as "something indicating superiority"; furthermore, he could not explain what was "material" about certain advertising claims that CDA had challenged (Tr. 1042-43).

222. In addition to their confusion about materiality, CDA or its components have applied their own advertising standards in place of "false and misleading" for certain claims regardless of the truth of such claims:

> Claims that may "insult the public" (CX-1611-Z-44-45; Tr. 947-49)
>
> Claims that were insulting or offensive to a dentist's peers (Tr. 961-64)
>
> Claims that should be removed from an advertisement so that dentist's peers would fee; more comfortable (CX-359-A)
>
> Vague or ambiguous claims or claims the public would not understand (Tr. 944; CX-1611-Z-36-37)
>
> Subjective claims (CX-48-H, CX-945-A)
>
> Claims that do not "lift the image of the profession in the eyes of the public" or conduct which does not "elevate the esteem of the profession" (CX-1484-Z-49, CX-1611-Z-45, CX-115-A)

If advertising lists more than one location or uses fictitious name, unless approved by state (CX-745-C-D, CX-333-B)

Use of religious or ethnic affiliation in advertising (CX-1318-B).

6. Substantiation

223. In many instances, CDA and its components have restricted members' advertising on the ground that certain claims are inherently unverifiable. For example, the following claims were objected to (material in parentheses are comments by CDA or a component):

"a group of dentists dedicated to quality dental care at low cost" (implies superiority, not verifiable, and includes use of lowest price) (CX-373-B-C);

"comfortable and personalized" (CX-1078-A; unverifiable);

"latest equipment and gentle, caring techniques" ("Advertising claims as to the quality of services are not susceptible to measurement or verification. Accordingly, such claims are likely to be false or misleading in any material respect") (CX-759); and

"gentle, caring, qualified dentist" (implies superiority, raises unjustified expectations, and is not verifiable) (CX-413-B).

224. Some ethics committee chairmen, and a former chairman of CDA's Judicial Council, testified that certain advertising claims are inherently unverifiable. These claims include: "State of the art" (Tr. 880, CX-1580-Z-29); claims of low prices or quality claims (Tr. 1053, 1071); "affordable" or "reasonable" fees, "latest in dentistry," "quality gentle care" "caring" (Tr. 483-84, 490-91; CX-1610-Z-13, Z-17, Z-27-28, Z-32-33); all superiority and quality claims

(CX-1608-Z-17, Z-52-53, Z-41-43); "more gentle than other dentists in my area" (Tr. 938).

225. One of CDA's components warned a member:

We would like to remind you that a fee survey - whether conducted formally or informally and by an individual or the dental society - is illegal and can be construed as price-fixing by the Federal Trade Commission. At this time the FTC is pursuing a lawsuit involving just this type of situation and it is being watched closely by the ADA. Your colleagues are restricted by law from relaying their fee schedule to other dentists - and we would ask that you keep in mind that the word of patients is not always totally reliable (CX-1293-A). (See also Tr. 490-91).

7. Verification by the Public

226. CDA components have objected to advertising claims because they are not verifiable by the public. For example:

In May of 1993, one of CDA's components informed a member that his advertisement violated the Code, in part, because the phrase "high quality dental services" suggests unique or general superiority to other practitioners [and] is not susceptible to reasonable verification by the public (CX-63-A);

Also in May of 1993, one of CDA's components objected to an applicant's use of the phrase "gentle" because, among other things, "statements should be avoided which contain a representation or implication regarding the quality of dental services which would suggest unique or general superiority to other practitioners which are not susceptible to reasonable verification by the public" (CX-467-A);

In June of 1993, one of CDA's components objected to an applicant's use of the phrase "with the utmost degree of professional care" because, among other things, it is a quality claim that suggests superiority that is not susceptible to reasonable verification by the public (CX-120-B); and

In November of 1993, one of CDA's components objected to an applicant's use of the phrase "[we] render personal quality dental care" because it is a "representation or implication regarding the quality of dental services which would suggest unique or general superiority to other practitioners which [is] not susceptible to reasonable verification by the public" (CX-381-B).

227. A number of component ethics committee chairmen, as well as Dr. Nakashima, the current chairman of CDA's Judicial Council, testified at trial and in depositions about verification of advertising claims by consumers. Dr. Lukens testified that the word "best" is objectionable because "it implies superiority and is undeterminable by the public" ("[i]f the public was to read that advertisement, they would have no way of judging whether this dentist was better or worse than another dentist") (CX-1610-Z-10-11).

Dr. Abrahams testified:

> Well, semantically how does one arrive at the ability to say that a practitioner offers something that's superior to what another practitioner offers, how does one verify it? How could the same thing, on the same realm, how does one know that one is offering -- as a consumer now, reading the advertisement -- how does one know that the prices are cheaper than someone else's (CX-1579-Z-20).

228. At trial, Dr. Lukens testified that an advertisement would be false or misleading if the general public would be unable to determine the truthfulness of the advertisement

"just by reading it" (Tr. 486), and agreed that "representations that consumers cannot verify on their own from the ad are violations of Respondent's code" (Tr. 509). Dr. Nakashima, in explaining his concerns about the phrase "we are dedicated to maintaining the highest quality of endodontic care," testified:

> A Well, the statement needs to be verified in that it needs to state what specific manner of service qualifies them to say "the highest quality of endodontic" -- they need to spell out what it is that assures the patient the highest quality of -- what is it that they do that assures the patient the highest standards, the highest quality. They need to be able to validate and verify -- he needs to spell out what it is that he does makes the statement correct.
>
> Q And he needs to do that in the ad, is that correct?
>
> A Yes.
>
> Q And even though he can verify it, has adequate substantiation, the dentist cannot advertise this phrase unless that substantiation is in the --
>
> A It must be in the ad.
>
> Q -- in the ad?
>
> A Yes (Tr. 1545).

The next day, the Doctor testified that advertising does not need to include the required substantiation in order to comply with CDA's Code of Ethics (Tr. 1717-18).

229. CDA has also objected to the phrase "a caring gentle dentistry team," because it was not possible for a patient to verify claims such as "we care" (CX-737-B). In another matter, CDA objected to "affordable" because the

public purportedly has no means to measure such claims (CX-596). A component also objected to an applicant's use of the word "trustworthy" for the same reason ("statements shall be avoided which would contain a representation or implication regarding the quality of dental services which would suggest unique or general superiority to other practitioners which are not susceptible to reasonable verification by the public") (CX-391).

H. CDA's Reliance on State Law and Regulation

230. Although not an agent of the State of California (Ans. at ¶ 10), CDA's advertising policies look for guidance to the Dental Practice Act, the Business and Professions Code, and regulations of the State Board of Dental Examiners (Tr. 1447-50, 1468-69; RX-136-A-E, RX-137-A-C, RX-138-A-G).

231. CDA takes an active role in enforcing advertising restrictions because it believes that, due to budget constraints, state agencies are not enforcing the laws on advertising (see CX-1442-A, CX-1444-A: "[t]he State Board of Dental Examiners has listed advertising enforcement dead last on its priority list"). (See also Tr. 1469-70; CX-1390-B, CX-1350-A, CX-1445-D).

232. The Chairman of CDA's Judicial Council testified that the President of the Board of Dental Examiners told him that "the only reason that there doesn't seem to be a strong emphasis on that [advertising] by the Board is due to budgetary constraints and staff constraints" (Tr. 1469-70); and, the former Chairman of CDA's Judicial Council, and a current member of CDA's Board of Trustees, testified:

> [T]he board's capacity regarding advertisements is very, very low. I have never seen a case where the board has actually restricted or told anyone that their advertising was in violation of state law. . . . [Advertising is at or near the bottom of the Board's priority list] because the

> Board, because of budgetary restraints, has no money to go out and enforce that (Tr. 1034, 1038).

233. Other statements by CDA echo this sentiment:

> [State law has] not been enforced by the state Board of Dental Examiners because of budgetary restraints. CDA is filling a void (CX-1442-A).
>
> The state Board of Dental Examiners has listed advertisement enforcement dead last on its priority list. . . . The FTC doesn't do much enforcement either. [Respondent] does it because it needs to be done (CX-1444-A).
>
> CDA is basically doing what the state agency should be doing. We are being sued because of [a] Code of Ethics that says 'must abide by the rules and laws of the state' which is the Dental Practice Act. Because the Board of Dental Examiners does not have the funds to enforce the advertising portions the FTC is saying CDA should not (CX-1390-B).
>
> [Respondent's position is that] our code only enforces state law, which the BDE [Board of Dental Examiners] have so far been unwilling to enforce (CX-1350-A).
>
> Manpower and priorities limit most of the board action to warning letters and follow-ups based only on complaints from other dentists (CX-1445-D).
>
> [I]f Dr. Miley has his way and the CDA went after no one for discipline until the state board had, then the majority of the violations in the state would go unaddressed, they would go unaddressed for nonmembers, they would go unaddressed for members. No advertising violation would ever receive any kind of discipline whether it be a reprimand or a suspension or expulsion (CX-724-Z-161-62) (Argument by prosecutor at a CDA disciplinary hearing).

234. CDA's attempts to enforce state law have resulted in confusion about the appropriate standards which should be used when judging members' advertising. For example, during the trial a CDA representative agreed that § 1680(i) of California's Business and Professions Code did not prohibit superiority claims that are truthful and no deceptive (TR. 1477-78); yet, from 1982-1993, CDA took the position that all claims of superiority were unlawful:

> Claims of superiority are proscribed by Section 1680(i) of the Dental Practice Act and thus violate Sections 5 and 20 of the CDA Code of Ethics (1983 letter to a component from CDA) (CX-885-A).
>
> Words denoting professional superiority or the performance of professional services in a superior manner are prohibited by Business and Professions Code Section 1680(i) (CDA's Advertising Guidelines) (CX-1262-G) (1988).
>
> MARS also determined that by using the phrase "Highest Standards in Sterilization," [dentists] are advertising in violation of Section 1680(i) of the Dental Practice Act, which prohibits advertising the performance of services in a superior manner, as well as the previously cited Section 5 of the CDA Code of Ethics (CX-394-B) (1993 letter).

235. CDA objects to "quality" claims, equating them, at times, to superiority claims (see, e.g., CX-391-A); also, it has claimed from 1985-1993 that the Dental Practice Act imposes an absolute ban on guarantee offers (CX-22-B, CX-497-C). However, in 1985, the Board of Dental Examiners stated that it did not consider claims like "quality dental treatment" as superiority claims (CX-1622); and, during the trial a CDA representative testified that § 1680(i) of the Business and Professions Code did not prohibit all guarantees (Tr. 1478-79).

236. CDA has also, from 1986 through 1993, told its members that §§ 651(b)(4) and (c) of the Business and Professions Code imposes an across-the-board ban on representations of low prices (CX-832-B, CX-730-B, CX-32-A), but at trial, a CDA representative agreed that the Act does not prohibit all representations of low prices (Tr. 1479-80). Furthermore, the State Board notified CDA in 1986 that it did not object to the phrases "low fees," "reasonable fees," and "low cost" fees (CX-1426-A). (See also CX-1622).

237. From 1982 to 1993, CDA and its components have told their members that a Board of Dental Examiner's regulation concerning discount advertisements prohibits such advertising unless five elements are disclosed therein, a requirement which the Board modified in 1985 (CX-1622) but which CDA and its components continued to enforce. This requirement was so complicated that it essentially constituted an absolute ban on discount advertising:

> Additionally, the words in the coupon "Presentation of this card allows one complete dental examination, x-rays, oral evaluation, and treatment plan at 25% discount for cash," violate the Dental Practice Act regulations for advertising a discount . . . (CX-445-B);
>
> The referenced advertisement also contains the statement, "Senior Discount." The advertisement fails to list the dollar amount of the non-discounted fee for each service, and to inform the public of the length of time the discount will be honored. Therefore, the advertisement violates section 1051 of the regulations adopted by the Board of Dental Examiners . . . (CX-497-C-D, CX-855-A).

238. Requiring an advertisement offering a discount to senior citizens to list the dollar amount of the non-discounted fee for each service is, as a practical matter, a ban on discount advertising (F. 180).

239. Some witnesses understood that state law does not impose absolute prohibitions on certain kinds of advertisements; others were not so sure. For example, Dr. Lukens testified that representations of low prices violate the Dental Practice Act (Tr. 515-18) yet he did not know how the Board applies or enforces the Dental Practice Act regarding claims such as "prices as low as" or "lowest prices" (Tr. 535-36).

240. Dr. Soo Hoo testified that the Dental Practice Act prohibits advertising "anything about quality" (Tr. 706) but he has never asked the Board of Dental Examiners how they apply or enforce the Dental Practice Act regarding quality claims (Tr. 707).

241. Dr. Yee testified that he believes the Dental Practice Act prohibits offers of senior citizen discounts that do not include each disclosure set out in Board regulations (Tr. 955-56). However, he also testified that he does not know how the Board of Dental Examiners applies or enforces the Dental Practice Act regarding discount advertising (Tr. 956). Nor does CDA, according to Dr. Lee, when it decides that a dentist's advertisement violates state law, determine the position of the Board of Dental Examiners concerning low price, guarantee, or discount advertising (Tr. 1034-36, 1046, 1049-50, 1065-66).

242. Also, Dr. Nakashima testified that he does not know how the Board applies or enforces the Dental Practice Act and Board regulations concerning discount advertising, offers of guarantees that are truthful and non-deceptive (Tr. 1475-76), or offers of a senior citizen discount that do not include the disclosures listed in Board regulations (Tr. 1537).

243. Moreover, CDA and its components challenge advertisements which, by their very nature, could not be false or misleading in a material respect. Thus, it has objected to advertising a fictitious name without obtaining a permit (CX-333-A), and an advertisement which is not exactly as

approved by the Board of Dental Examiners . . . (emphasis in the original) (CX-543-B). CDA also objects to all advertising of ethnic or religious affiliations and referred to this objection at a 1990 ethics workshop (CX-1318-B; see also CX-731). CDA also challenges advertisements that include more than one location unless the state has permitted practicing at more than one location (CX-389-F).

244. CDA knows that California's attorney general has advised the Board of Dental Examiners that state laws and regulations pertaining to advertising must be enforced in a manner that is consistent with United States Supreme Court rulings with respect to advertising by professionals (CX-1425-D).

245. As early as 1986, CDA knew that the Board of Dental Examiners interpreted the statute concerning representations of low prices less strictly than CDA thought was warranted by the statute. Specifically, the Board informed CDA that it does not interpret literally a statutory restriction on the advertising of "low prices," and does not challenge representations such as "reasonable fees" or "low cost fees"; CDA insisted, however, that those representations are prohibited by the statute and asked for written confirmation of the Board's interpretation (CX-1426).

I. The Administration of CDA's Advertising Policy

1. CDA's Advertising Standards

246. The standard against which CDA measured its members' advertising is set forth in Section 10 of its Code of Ethics, and has been unchanged from 1985 to 1993 (CX-1227-D, CX-1484-Z-49-50, CX-1577-Z-9-10, CX-1607-Z-8-9, CX-1610-Z-7). The standard during this period was whether the challenged advertisement was "false or misleading in any material respect. (CX-1284-E, 1982 Code of Harbor Dental Society) or "false, misleading or

deceptive in a material respect" (1982 minutes of CDA's Judicial Council).

247. In 1993 CDA claimed that in reviewing advertising, it "applies the standard of false and misleading in a material respect to determine whether or not the advertisement in its entirety violates the CDA Code of Ethics" (CX-1205).

248. Dr. Lee, a former chairman of CDA's Judicial Council, instead of using the word "entirety," described the 1993 change as adding "totality" to the standard (CX-1589-Z-18-19).

249. The meaning of the words "entirety" or "totality" is unclear. Dr. Nakashima suggested that "reviewing the advertising in its entirety" means that the greater the seriousness and number of the violations, the more likely that a dentist will be denied membership in CDA or a member will be cited to trial (Tr. 1725-26). On the other hand, Dr. Lee, a current member of CDA's Board of Trustees and a former member, and chairman, of CDA's Judicial Council, when asked about the meaning of "viewing an advertisement in its entirety," answered that he did not know what it was about the entirety of various advertisements that caused claims to be false or misleading (Tr. 1049, 1051; CX-1589-Z-28-29).

2. Guidance With Respect to CDA's Advertising Standards

250. Dr. Yee testified that the phrase "we cater to cowards," which was, at one time, unacceptable, can now be used (Tr. 964). He was then asked:

> Q Has your committee gone back to that dentist and said, "We objected to 'we cater to cowards', before, but we are no longer objecting"?
>
> A Not specifically that dentist, no.

> Q So how would that dentist know that advertising that the society has objected to before was no longer objectionable?
>
> . . .
>
> A There is a component newsletter that comes out once a month in which, when it gets close to the time in which dentists are submitting their advertisements for the yellow pages, that we print the guidelines in which -- or in which we also state that we offer to review their advertisements. That's the way we disseminate information as to changes.
>
> Q And do you recall the newsletter stating that "We cater to cowards" is now okay, and it wasn't before, or is it just that you set out the standard that you use?
>
> A It's just that we set out the standard that we use.

251. Until 1988, CDA prohibited the following representations:

> gentle dentistry; we cater to cowards (1983) (CX-971-B-C);
>
> gentle, quality care (1984) (CX-799);
>
> Fast and caring (1985) (CX- 675-A);
>
> personalized (as in "complete personalized family dentistry") (1988) (CX-1106-A, B);
>
> gentle dental care (1992) (CX-767-A); and
>
> gentle care; gentle exams (1993) (CX-24).

252. In April 1988, CDA began to inform individual components or individual members that the use of the term

"gentle" did not violate its Code (RX-6), but CDA did not then notify either its entire membership or all of its components of this change, and a number of the components continued to tell its members and/or applicants that CDA's Code prohibited the use of the term "gentle." For example, components objected to:

> gentle dentistry is an art (1991 letter from component to applicant) (CX-563-A);
>
> the term "gentle" as in "gentle injections," "gentle exams," and "gentle care" (1993 letter from component to member) (CX-24-A-B); and
>
> "gentle"; "we cater to cowards" (1993 component newsletter) (CX-1363).

253. While CDA was aware in November 1992 that at least one of its components continued to restrict the use of the word "gentle" (CX-933), it took no action until June 1993 to notify the remainder of its components that the use of that word was acceptable (CX-1205). Even after this date at least one component continued to question whether the use of the word "gentle" was consistent with CDA's Code (CX-783).

254. Over the years, CDA has taken inconsistent positions concerning the word "reasonable." In 1985, it notified its components that while the use of the word "reasonable" in advertisements previously had been considered acceptable, it no longer was acceptable because "reasonable" is an inexact reference to the cost of dental services, and along with the term "affordable," "may violate [CDA's] Code and state law and should be avoided." CDA directed the components "as soon as possible" to inform members of the information CDA was providing, referring this time to "violations" of the Code or state law (CX-1199-C).

255. In 1991, CDA changed its position, finding that the term "reasonable" was acceptable (CX-1223-D). This change was based on a 1978 decision -- re-discovered by CDA in 1991 -- by its Judicial Council that the word "reasonable" was not objectionable (RX-57).

256. In 1993, one of CDA's components advised a dentist that the phrase "reasonable fees" violated CDA's Code (CX-778-A).

257. Also in 1993, one of CDA's components objected to an applicant's advertising because, among other things, it included the representations "reasonable," "low prices," and "goes easy on your pocketbook" (CX-391-A).

258. Finally, in 1993, CDA itself recommended denial of an applicant for membership because, among other things, his employer's advertising included the phrase "reasonable fees quoted in advance" (CX-118-B).

259. One of the reasons for CDA's inconsistent interpretation of phrases used by its members in advertisements is the lack of a consistent procedure to inform members about changes in CDA's advertising rules.

260. Some of the problem lies in confusion about the role of CDA's Judicial Council and the component societies. For example, Dr. Nakashima testified that after his component asked CDA's Judicial Council about the use of "comfort" and "gentle treatment" and received a response:

> Q And when you found what their response was, did you send out a memo with an indication to your members saying that it has now been determined that "comfort" and "gentle treatment" are acceptable terms?
>
> A No.
>
> . . .

We didn't feel that it was necessary for us to send a letter to all of our members about the determination of the Judicial Council. That has never -- we never perceived that as our role. . . . (Tr. 1489).

261. Interpretation and application of CDA's advertising rules varies between components. For example, Dr. Soo Hoo, the current ethics committee chairman for the Southern Alameda County Dental Society disagrees with Dr. Nakashima of the San Francisco component that advertising a senior citizen discount without all of the required disclosures violates the Code (Tr. 696, 1742-43).

262. Interpretation and application of CDA's advertising rules even varies within a component depending upon which committee handles a matter: while Dr. Soo Hoo of his component's ethics committee believes that across-the-board senior citizen discounts do not violate the Code, his component's membership committee has challenged this kind of offer and, in 1989, denied an application for membership because the applicant offered "Senior Citizen Special Courtesy Discount" (CX-1016-D-E).

263. Dr. Cowan, ethics committee chairman of the Tri-County Dental Society, testified that he does not object to advertising simply because it contains words such as "reasonable," "low, or "affordable" (Tr. 1574-75), yet, his component's membership committee notified an applicant in 1993 that her advertising violated CDA's Code because, among other things, it included inexact references to the costs of dental services ("reasonable," "low prices," "goes easy on your pocketbook"), and asked her to sign, date and return the component's letter to indicate that she "acknowledges" the component's objections and that she will comply with the Code (CX-391-B). Inconsistencies like this may be due to the lack of contact between ethics committee chairmen in some components and their counterparts on membership committees (see Tr. 475-76, 856, 933; CX-1607-Z-1-2, CX-1608-Z13-14). -

264. Such inconsistencies are inevitable because of CDA's failure to adopt a procedure which ensures that rulings on members' advertising are promptly and consistently sent to all members:

Q When you were on the Judicial Council, Dr. Lee, did you know how the components interpreted and applied CDA's Code of Ethics?

A Did I -- did I know?

Q Yes.

A No.

Q Did you know, when you were on the council, whether any component prepared and distributed any materials regarding advertising to its general membership?

A No.

Q And again this is when you were on the Judicial Council, did you know whether any component prepared and distributed any materials regarding advertising to give to applicants or new members?

A No.

Q Do you know whether any component has given its membership guidance concerning how to advertise consistently with CDA's code?

A No, I'm not aware.

Q Have you seen any component newsletters in which the component has given its membership guidance on how they could advertise consistently with CDA's code?

A No.

Q When you were on the Judicial Council, did you ever ask any of the components whether they were giving their members guidance on how to advertise consistently with CDA's code?

A No (Tr. 1015-16).

Dr. Nakashima, the current chairman of CDA's Judicial Council, testified similarly at his deposition:

Q Doctor Nakashima, how does the Judicial Council know, if it does, how the components are interpreting and implying CDA's code of ethics?

A I don't really know that we know specifically how the -- I think the only time we know is when they refer matters up to us and they fill out the form and -- if they're having trouble, I guess they have to spell out to us exactly what it is that they're having trouble with. So that's the only way we know -- is, as matters are given to us from the forms that they fill out or send to us. That's how we know there's a problem going on.

Q Doctor Nakashima, have you, as a member of the Judicial Council or as chairman of the Judicial council, ever reviewed any component materials that addressed advertising? And what I mean at this time is, I -- materials that the component is going to use in workshops or materials that the component is going to give to new members to apprise them of appropriate rules?

A No, we don't -- I don't individually review materials given out by the components to their new members, no (CX-1588-Y-Z-1).

J. The Effect of CDA's Advertising Restrictions

1. The Importance of Advertising

265. Dr. John Christensen, the owner of an advertising agency which specializes in dental advertising (Tr. 546, 559), testified that "the marketplace" [consumers] "told us that they are staying away from dentists because of this fear aspect" (Tr. 586) and that advertising emphasizing comfort will "absolutely" bring in more patients (Tr. 585); conversely, restrictions on quality of care advertising, or the advertising of discounts would affect both dentists and consumers:

> The practitioners themselves, who -- if I am answering the question properly, the practitioners themselves that were not allowed to communicate these optimal benefits to their marketplace would not attract as many new patients into their practice. And I believe in that specific submarket and in a general sense there would be less people going to the dentist (Tr. 603).

266. Consumers of dental services select a dentist because of several factors. They include: price, including out-of-pocket costs, and discounted fees (Tr. 468, 588-89, 680, 778, 788-89, 857-58, 921, 1004; CX-1606-M-N, CX-1609-M, CX-1654-C); convenience (Tr. 680, 921, 1004; CX-1603, CX-1606-M); safeguards to prevent spread of disease (Tr. 578-79; CX-1588-K, L); sensitivity to fears about dental procedures (Tr. 585-88, 777; CX-1577-M, CX-1608-N, CX-1610-S); concern about their well-being (Tr. 576, 920-21; CX-1578-J, CX-1606-L-M, CX-1609-M, CX-1610-S); and information about the type and quality of service (CX-1589H-I-J, CX-1579-S-T, CX-1589, CX-1606-N, CX-1607-L-M, CX-1609-213).

267. Advertising which conveys the above information is important to consumers (Tr. 469, 527, 680-81, 922).

2. The Importance of CDA Membership

268. There are important reasons for California dentists to become a member of CDA; reasons which explain why, when a member or applicant's advertising is challenged, the dentist often chooses membership over advertising, and changes his advertising to conform to CDA's rules.

269. As an example, an applicant, who was denied membership in 1989, told one of CDA's components:

> As you are well aware, membership in the dental society is a distinction which bears fruit educationally, economically, as well as enhancing my reputation in the community. Denial of membership in the society has serious adverse consequences to me and my practice, and I do not intend to take this matter lightly (CX-880).

270. In 1987, the attorney of a dentist who was denied membership in CDA because of his employer's advertising wrote to the component:

> [The applicant] recognizes the advantages of membership in your organization. Membership would allow him to (1) take advantage of the insurance benefits that can be obtained only through [respondent], (2) take advantage of your excellent continuing education programs, and most important, (3) membership would enhance his reputation as a dentist due to the high standards your organization maintains (CX-789-B).

271. In 1985, an applicant who was denied membership in CDA told one of CDA's components:

> One of my main reasons for joining the dental organizations was to have T.D.I.C. Insurance. I have an anesthetist who works with me to provide dental treatment under general anesthesia. T.D.I.C. is the only company providing that type of coverage for the general dentist.
>
> If I am denied membership in the dental association then T.D.I.C. will not renew my insurance coverage and I will not be able to get it back. (Please see enclosed letter from T.D.I.C.) Also, I will have to pay a large payment to maintain the coverage for the year I have been covered by T.D.I.C., so I do not want to change companys [sic], even if there was another company that will be offering coverage (CX-802).

272. In 1988, a dentist facing possible loss of membership told CDA:

> I have been a member of CDA and ADA for many years and do not take lightly my possible loss of membership in the ADA due to what I feel are unnecessary and possibly illegal restraints on my ability to advertise. . . . Resigning my membership in CDA will cause me to lose my membership in the ADA which is the only national dental organization of import, and this greatly distresses me (CX-427-A, B).

273. In 1988, an attorney for an applicant denied membership in CDA informed the component to which the applicant had applied that it was "imperative" that reevaluation of his client be completed promptly to avoid termination of the applicant's professional liability insurance, which he had obtained through CDA:

> Obviously, any termination of my client's professional liability insurance is likely to cause him significant financial detriment. Therefore, your prompt action is essential (CX-512).

274. CDA is so important to some members that they have hired lawyers to assist them in gaining, or retaining, membership (CX-56, CX-83, CX-506, CX-510, CX-526, CX-789, CX-860). Also, applicants denied membership in

CDA have reapplied for membership (CX-1038-C, CX-1041, CX-362, CX-1011-A, CX-1103, CX-659-B, CX-664-A, CX-666, CX-304-A, CX-308).

3. Member Compliance With CDA's Advertising Restrictions

275. Dr. Abrahams, the Santa Clara County component ethics committee chairman, testified that [t]o the best of my knowledge, every member of the Dental Association [his component] is compliant" with CDA's advertising rules (CX-1579-Z-38-39).

276. According to Dr. Hoey, the Redwood Empire component ethics committee chairman, "about 100%" of his component's members' advertising is consistent with the component's advertising rules (CX-1577-Z-44).

277. Dr. Ouint, the San Gabriel Valley component ethics committee chairman, testified:

> When I get a new phone book at home -- in the office at home I'll thumb through it. We do not see any fractures [sic] anymore because these people are educated to what they can say and what they can't say. It's very rare that you'll see an illegal ad, and if you do see one, it's right on the borderline. . . . We don't see illegal ads in the phone books anymore, hardly at all (CX-1608-Z-12).

278. Dr. Green, the West Los Angeles component ethics committee chairman, estimated that the advertising compliance rate of the members of his component is in the 90th percentile (CX-1606 -Z-27) .

279. The Central Coast component ethics committee reported at the component's 1988 board meeting that "all current yellow page advertisements in GTE and Pacific Bell telephone books are within the ethical guidelines as set forth by CDA" (CX-1265-A). At a 1989 board meeting, the

component reported that the "SLO" directory had no violations (CX-1266-B).

280. In 1990, the Tulare-King ethics committee chairman reported that in the yellow page advertisements:

> all display ads [in the telephone yellow pages] were reviewed & found to be in compliance for [component] members. Several minor errors in the listings section were noted & those not in compliance were contacted by individual Ethics Committee members (CX-1413).

281. In its 1989-90 annual report, the Kern County component reported that there had been no major incidents regarding advertising in the preceding year, only some minor infractions in the yellow pages listings (CX-1298-B), and in its 1992-93 annual report, the component reported:

> This year has been a very quiet one for the ethics committee. This is due in large part because each of you is making the effort to follow our guidelines (CX-1300-C) .

4. Changes to Challenged Advertisements by Members

282. From 1982 until 1993, CDA and its components have challenged hundreds of advertising representations which on their face are not false or deceptive (see CPF's 580-949 which analyze CDA's challenges to the advertisements of 393 dentists). Many dentists, whose advertising was challenged, agreed to modify it (Appendix B to Volume II of complaint counsel's proposed findings) despite the fact that modification or discontinuance of advertising could result in a decrease in patient volume (Tr. 272-74, 602-03).

283. Several component ethics committee chairmen testified that they did not know of a single instance where a member has refused to modify or discontinue challenged advertising (Tr. 86-63, 1353-56, 480, 689, 928;

CX-1606-Z-3-4, CX-1608-Z-35, CX-1609W), even when they disagreed with the component. For example, one dentist responded:

> I disagree with your findings and know we could belabor the question for hours and come to no conclusion. Therefore we shall disagree agreeably. The statements in question will no longer be used in any mailings from this office (CX-480).

284. A group of dentists whose advertising was challenged because it included terms such as "fully modern" and "luxurious atmosphere" responded:

> We take exception to being chastised for use of the terms "fully modern . . . luxurious atmosphere." To construe that these phrases imply superiority is a matter of opinion and subject to semantic disagreement. Indeed, to state that these terms are not verifiable is open to argument. The term "prices you can afford" should be taken in context. The phrase does not mean nor imply "lowest prices" (sec. 10 #3 & 4). Our philosophy is to strive for quality and our practice is to provide that at affordable prices. This is not a sales gimmick, it is policy.
>
> Our intention is to work within the framework of CDA's code of ethics and we will be incorporating your recommendations in our new brochure. . . . While we agree to comply with your request, we feel that it is time that the Western Dental Association petition the California Dental Association to review the code of ethics (CX-145-A).

285. A dentist whose representation of low prices was challenged, responded:

> Thank you for your written notice indicating that the Ethics Committee feels that my ad in the Santa Cruz Yellow Pages may be in violation to the Dental

> Practice Act . . . and [CDA's] Code of Ethics . . . as it relates to the phrase "Fees that Fit a Family Budget."
>
> I do not feel that the phrase above violates the Code or the cited Dental Practice Act sections. However, I have never been one to take issue with the valuable work of the Ethics Committees of [CDA] unless it was clearly warranted.
>
> In this case I have elected to alter the ad in the subsequent insertions for the Yellow Pages (CX-159).

286. In some cases, members whose advertisements have been challenged have simply given up advertising (CX-1406, CX-570, CX-606, CX-607), in one case, at a substantial cost. Referring to an advertisement which was discontinued ("gentle dentistry in a caring environment"), a component ethics committee stated:

> It is the opinion of this Ethics Committee that this advertisement has provided [dentist] with 300 new patients in the last 6 months it is therefore a very big sacrifice for her to eliminate the ad (CX-244).

5. Effect of CDA's Advertising Restrictions on Non-Members

287. Respondent's restrictions on advertising also affect non-members of CDA, for CDA holds members and applicants responsible for advertising published by employers or other businesses such as referral services:

> IT IS VERY IMPORTANT TO REMEMBER THAT IN ADVERTISING EACH CDA MEMBER IS RESPONSIBLE FOR ADVERTISEMENTS FROM WHICH HE OR SHE MAY BENEFIT WHETHER OR NOT THE MEMBER'S NAME IS STATED IN THE AD. Accordingly, members need to be aware that if their employers advertise in an unacceptable manner, the member is also responsible since he/she

> benefits from the advertisement as well. ("7 Questions Frequently Asked of CDA's Judicial Council" (CX-1358-B))

288. Employers of dentists who are not CDA members have agreed to make changes in their advertising that CDA demands (CX-380-B). In 1993, an associate of a dentist who was applying for employment agreed to change his advertising:

> I did have a chance to review the information enclosed and I have no problem making the appropriate modifications. The one advertisement mentioned was not my ad at all (it was placed by Dr. Paul, the general dentist with whom I share space) but I have spoken to him and he has assured me that he will make any and all appropriate modifications to ads that mention or contain my name (CX-124-A). (See also CX-510-B, F).

289. CDA has also contacted referral services to correct advertising which is not consistent with the Code. For example, it instructed a number of its components to contact more than twenty member dentists who participated in the da Vinci Studio referral service because its advertising was inconsistent with the Code (CX-279-96). CDA's objection was that the service had advertised "very affordable, and CDA instructed the components to contact participating members and "remind [them] of their ethical and legal obligations" (CX-279-96).

290. Similarly, in 1987, CDA recommended that acceptance of a dentist into membership be conditioned on correction of advertising by a competitor referral service, 1-8OO-DENTIST:

> [Applicant] stated that she is represented by the 1-800-DENTIST referral service. A review of the advertising submitted for this service indicates several statement [sic] are in violation of the CDA Code of

> Ethics and state law. Please make sure [applicant] understands that she is responsible for any advertisement published on her behalf and that the following changes must be made for her to become an unconditional member next year (CX-413-B).

291. CDA also holds members and applicants responsible for what it deems objectionable advertising by hospitals that promote dental services. For example, in 1992, CDA determined that advertising by a hospital promoting dental services was inconsistent with its advertising rules and directed one of its components to meet with the member-dentists whose services were advertised, and instruct them either to have the advertising corrected, or have their names removed from it (CX-354-B). The hospital did correct the advertising, and did so even though the Board of Dental Examiners determined that the advertising did not violate the Dental Practice Act (CX-355).

292. CDA members affiliated with a non-profit charitable organization, "Doctors with a Heart," discontinued use of a press release that informed the public that the organization would provide free care "to children whose parents cannot afford it" on Valentine's Day, after CDA threatened disciplinary action against them. The members discontinued the advertising even though they had been informed by a representative of the California State Board of Dental Examiners that the advertising did not violate state law. The members feared that they could not continue to participate in the program after 1988 and maintain their membership in CDA ("At this time it looks doubtful. There is just so much hassle a person can take from one's peers.") (CX-894, CX-897-D).

293. For other examples of applicants or members who have been challenged by CDA or one of its components on the basis that advertising by an employer or other entity with which the applicant is affiliated violates CDA's Code, see Appendix A to Volume II of complaint counsel's proposed findings.

6. Restrictions on Free Dental Screening of Schoolchildren

294. Through their members, CDA's components have offered school dental screening programs whose results are given to parents (CX-1168, CX-1169).

295. In the early 1980's, CDA became concerned that some members were using screening to promote their own practices by including their names and office addresses on materials that were sent to parents (CX-1118-D). It therefore notified members that screening programs should be arranged through the dental societies and that "even the handing out of business cards (or other printed materials) with the screening dentist's name is considered soliciting" (CX-1161-A-E).

296. In 1984, CDA's Judicial Council passed a resolution stating:

> [I]t is the position of the Judicial Council that solicitation of school children on any private or public school ground(s) is deemed not to elevate the esteem of the dental profession (CX-1115-A).

297. CDA based its policy on its interpretation of a state statute prohibiting the solicitation of school children "to subscribe or contribute to the funds of, to become members of, or to work for, any organization not directly under the control of the school authorities" (California Education Code, Article 3, § 51520) (CX-1115-B-C, CX-1166).

298. In May 1993, at the behest of CDA, which learned that certain members who were conducting school screenings were using materials which included their names and addresses, a components president "advised all concerned by letter" that " [w]hether a rubber stamp or written name is used [by a screening dentist] it must not continue. It is a violation of state law and [CDA's] code of ethics" (CX-1343-B).

299. Several dentists have acceded to CDA's wishes regarding dental screenings.

Dr. Beth Hamann

300. Dr. Hamann conducted school dental screenings during the years she practiced in California. At times she gave students a toothbrush personalized with her name and telephone number, as well as a copy of her office newsletter (Tr. 797-98).

301. Her component society informed the schools where she conducted screenings that they were "not an acceptable activity for them to do with private dentists" (Tr. 796). Thereafter, the schools would not permit her to do screenings although the component never showed why the screenings were false or misleading (Tr. 797).

302. Cessation of the school screening meant that Dr. Hamann lost some potential customers (Tr. 798-99) Her component society did not, as it promised the schools, conduct screenings after Dr. Hamann was refused permission to do so (Tr. 797).

Dr. Roger C. Sanger, Dr. James P. Stenger and Dr. Ray E. Steward

303. In the 1980's, Drs. Sanger, Stenger, and Steward, CDA members, conducted private pre-school screenings, at their request, outside the auspices of their component; they used either their own forms or their component's form stamped with their name and office address (CX-1149-A).

304. The component to which the dentists belonged objected, in 1983, to the use of forms in their screenings which listed their names and address. The dentists agreed to stop using the component's forms when conducting screenings at private pre-schools (CX-1149-A), but did not agree to stop using their own forms (CX-1149-A).

305. CDA, asked for advice by the component, told it that under a recently adopted policy, solicitation of school children on any private or public school ground is deemed not to elevate the esteem of the dental profession, and recommended that the component counsel the dentists and report the results of the counseling to CDA (CX-1151-A-B).

306. The component then informed the dentists that CDA had advised that the dentists screening form would need to be changed "to assure conformity with [CDA's] code" (CX-1152-A-D). In response, the dentists agreed not to perform screenings on public or private school premises and to participate only in component screenings. However, they did not agree to cease screening at day care centers using their own forms because they believed that day care centers did not fall within the definition of "schools," as they are not regulated by any educational agency of the state. The dentists did say they would modify their day care screening forms to eliminate the word "school" (CX-1153).

307. In July 1985, the component asked CDA whether day care centers are "schools" within the meaning of its resolution concerning school solicitation (CX-1154-A-B).

308. In form letters dated May 5, 1986, the component objected to the dentists' use of their pre-school health education form because such use "may" violate CDA's Code, and informed the dentists that they would have to delete their names from their screening form "to assure conformity" with CDA's Code. The dentists agreed to alter the screening form to conform to CDA's Code (CX-1155-57). In a separate letter, they informed the component that they no longer would conduct screenings in private or public schools other than at the request of the component, and then would use no forms other than the component's form (CX-1158).

Dr. Douglas Grosmark

309. In 1991, Dr. Douglas Grosmark, a CDA member, attended a Halloween carnival (held at an elementary school

after school hours ended) (CX-1133-A) and distributed toothbrushes imprinted with his name and an attached card containing an offer to have a "complimentary video exam & $25 off your 1st visit" (CX-1132-B). Without Dr. Grosmark's knowledge, principals at two schools distributed the toothbrushes to the children during school hours (CX-1132-A-B, CX-1133-A-B).

310. By letter dated October 21, 1992, the component to which Dr. Grosmark belongs objected to his distribution at schools of any material on which his name was printed because it "may" violate a state law "which was adopted by [CDA] in 1981." The component asked him to confirm that his future visits to any school would comply with state law as interpreted by CDA (CX-1132-A-B).

311. The component was not satisfied with Dr. Grosmark's response and again demanded that he provide assurance that he would not distribute "imprinted" toothbrushes in the future, and informed him that "[a]ny further violations of this nature" would be reported to CDA (CX-1134). By letter dated November 25, 1992, Dr. Grosmark assured the component he would comply ("I do not intend to distribute imprinted toothbrushes to any schools") (CX-1135).

Dr. Rodney L. Mellor

312. Dr. Rodney Mellor, a member of CDA, is another dentist who conducted school screenings outside the auspices of his component and used his own .materials in conducting the screenings (CX-114 2 -A-B) .

313. In 1992, the component to which Dr. Mellor belongs objected to his use during school screenings of any materials on which his name was printed because it "may" violate state law (CX-1142-A). The component asked Dr. Mellor to provide assurance that any future visits he made to schools would comply with state law as interpreted by CDA (CX-1142-A).

314. Dr. Mellor acquiesced, and, by letter dated October 22, 1992, promised to comply with "ALL ethical standards" (CX-1143).

Dr. William D. Rawlings and Dr. J. Patrick Davis

315. Drs. Rawlings and Davis, members of CDA, are dentists who distributed their business cards at a pre-school program (CX-1146-A).

316. In 1993, the component to which the dentists belong objected to their distribution at pre-schools of business cards containing their practice's name because it "may" violate CDA's Code and state law (CX-1146-A). The component asked the dentists to provide assurance that they (1) would cease distributing business cards, or any other materials, on which their practice name appears during any school or pre-school programs, and (2) would include on all materials the complete name of their practice as it appears on their fictitious name permit (CX-1146-A-B). Drs. Rawlings, Davis, and Terry T. Yoshikane, by letter dated August 9, 1993, promised to make the required corrections (CX-1147).

317. Other dentists conducting screenings were contacted by CDA or their components with complaints that they did not comply with the Code or state law, but the record does not reveal whether they complied with the advice given them (CPF's 491, 492, 493, 494, 495).

7. Economic Analysis of CDA's Advertising Restrictions

318. CDA called, as a witness, Professor Robert Knox, who, complaint counsel stipulated, is an expert in economics and industrial organization (Tr. 1632).

319. Professor Knox has no expertise in, nor has he made any study of, the economic aspects of the dental market or dental advertising (Tr. 1624-25, 1629-32); however, he testified that since dental service markets are controlled by

the same economic phenomena as other businesses, many characteristics of the California dental services market can be analyzed using general economic principles and theory (Tr. 1625).

320 CDA also called Dr. Albert H. Guay, a retired orthodontist, for insight into entry to the dental services market and practice-related aspects of dentistry (Tr. 1223-24, 1226-28). He is the Associate Executive Director of the ADA's Division of Dental Practice which assists members with the business aspects of dental practice (Tr. 1246). Dr. Guay is not an expert in economics (Tr. 1250-52).

321. Dr. Guay testified that, unlike medical patients, dental patients are relatively price sensitive because they must pay for much of their care (Tr. 1243). Since dental treatment is not urgent, patients can "seek the best deal" (Tr. 1244, 1268).

322. Professor Knox testified that CDA's enforcement of its Code of Ethics with respect to advertising has no negative impact on competition in any dental market in California because it cannot erect any barriers to entry (i.e., an advantage which existing firms have over potential entrants (Tr. 1634)) into any dental market in California (Tr. 1633).

323. Professor Knox testified that the only entry barrier into dental service is the acquisition of a license issued by the California State Board of Dental Examiners (Tr. 1634); the need to complete dental school and the acquisition of an office and dental equipment are not barriers to entry (Tr. 1634, 1636). The over supply of dentists which complaint counsel point to as an entry barrier is, he stated, strong evidence of low entry barriers (Tr. 1637). In Professor Knox's view, CDA membership is not a prerequisite to successful practice in any California dental market (Tr. 1639).

324. Professor Knox also testified that scrutiny of dental advertising is pro-competitive because advertising which is

false or misleading has a negative impact on competition (Tr. 1643-45).

325. Professor Knox believes that dental advertising should be critically examined because dental service is an "experience good," i.e., a good that consumers cannot evaluate until after the service has been performed (Tr. 1632-33). Non-price claims, especially those relating to quality, are particularly difficult to verify (Tr. 1646-47), although, he conceded, consumers can make some judgments about quality of care (Tr. 1677-78).

326. Professor Knox concluded that even if CDA occasionally questions member advertisements which are not false or misleading in a material respect:

> the activities of the California Dental Association with respect to their enforcement of their Code of Ethics relative to advertising has no impact on competition in any market in the State of California, particularly with respect to price and output (Tr. 1640).

327. Professor Knox rejected the entire State of California as a relevant geographic market on the basis of Mr. Christensen's testimony that a radius encompassing 20 to 30,000 people "would be a market for dental services in California" (Tr. 1642-43). Professor Knox concluded that the dental markets in California are disaggregated, and it would be very difficult for CDA to exercise market power over price and output in all of them (Tr. 1639).

328. On cross examination, the Professor agreed that dental services "could be" a relevant product market (Tr. 1689) and that California "could be" a relevant geographic market. He also agreed that, hypothetically, CDA members can collectively exercise market power "if they act together ... ." (Tr. 1692).

329. Complaint counsel called three witnesses to testify about entry into the dental service market in California.

According to Dr. John S. Miley, opening a dental practice in California today is "an extremely difficult thing to do" (Tr. 331), and Dr. Richard A. Harder, who has established a number of dental practices in California, testified that "it would take about 18 months to actually start generating enough income to match that current month's expenses, and then it would probably require up to about five years to actually recover the capital costs" (Tr. 300).

330. Dr. Curtis P. Hamann, together with his wife, had to borrow approximately $400,000 to buy two existing dental practices (Tr. 756-60). The practices took about two years to become profitable, and it took about ten years for the Hamanns to pay off all of the associated debt (Tr. 764).

331. Dr. Miley testified that the financial requirements for setting up a dental practice are a gig impediment for young dentists today, since they are coming out of school $50,000-100,000 in debt (Tr. 330). See also CX-1628 ("private practice is most young dentists' first choice of practice setting ... However, if young dentists can't make a living in that setting, considering the cost of beginning/buying a practice on top of education loans, they are forced to practice in alternative settings").

III. CONCLUSIONS OF LAW

A. CDA's Activities Are In Or Affect Commerce

The Commission has jurisdiction over acts or practices "in or affecting commerce," § 5 FTC Act; 15 U.S.C. §45, providing that their effect on commerce is substantial, McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 241-42 (1980); Hospital Building Co. v. Trustees of Rex Hospital ("Rex Hospital"), 425 U.S. 738, 745-46 (1976). And, as long as the challenged acts or practices create "unreasonable burdens on the free and uninterrupted flow" of commerce, even local activities are subject to FTC jurisdiction, Rex Hospital, 425 U.S. at 738, 745-46.

The potential harm from the challenged conduct, rather than its actual effect on commerce, is the jurisdictional standard:

> because the essence of any violation of § 1 of the Sherman Act] is the illegal agreement itself--rather than the overt acts performed in furtherance of it--proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful.

Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330 (1991).

In American Medical Association, 94 F.T.C. at 701 (1979), aff'd as modified, 638 F.2d at 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. at 676 (1982) ("AMA"), the Commission determined that it has jurisdiction over state and local medical societies which restricted advertising by healthcare professionals because these activities, some of which were local in character, had a substantial effect on interstate commerce, 94 F.T.C. at 993-96.

As in AMA, CDA's activities "as a matter of practical economics," Rex Hospital, 425 U.S. at 745-46, place, or have the potential to place, substantial burdens on interstate commerce. These activities include:

> The receipt by CDA's members of reimbursements, which cross state lines, for dental services provided by them under health insurance plans which involve the federal government, i.e. Denti-Cal, which paid $500 million to participating dentists (F. 50).
>
> The purchase or lease of substantial amounts of dental equipment from out-of-state manufacturers (F. 51).
>
> Competition between CDA members and out-of-state dentists for patients, the out-of-state residence of some

> CDA members, and the treatment of patients residing outside of California (F. 55, 56).
>
> Restrictions on the contents of advertising by out-of-state suppliers and the placement by CDA of advertisements in national publications (F. 54).
>
> The use of the U.S. Postal Service to enforce CDA's Code of Ethics (F. 57).
>
> The collection and transmission of ADA dues from member dentists to ADA in Chicago (F. 62).
>
> The operations of CDA's for-profit subsidiary, TDIC, which provides professional liability insurance to out-of-state dentists (F. 60).
>
> The operations of CDA's subsidiaries, TDC and TDCIS which provide insurance and other services to CDA members through out of state companies (F. 59).
>
> The attendance of CDA officials and members at out-of-state conferences (F. 58).

B. CDA Is a Corporation Under Section 4 of the FTC Act

Section 5 of the FTC Act gives the Commission jurisdiction to prevent unfair methods of competition by "persons, partnerships, or corporations," 15 U.S.C. § 45 Section 4 of the Act defines "corporation" as "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members ...." 15 U.S.C. § 44.

In AMA, the Commission held that its jurisdiction under Section 4 extends to "nonprofit organizations whose

activities engender a pecuniary benefit[2] to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity," AMA, 94 F.T.C. at 701, 983 (1979); see also Michigan State Medical Soc'y, 101 F.T.C. 191, 284 (1983) ("MSMS");

> certain organizations ostensibly organized not-for-profit, such as trade associations, may be vehicles through which a profit could be realized for themselves or their members.

In its most recent case dealing with this issue, College Football Ass'n, 5 Trade Reg. Rep. (CCH) ¶ 23,631 ("CFA"), the Commission adopted a "two-pronged" test to determine whether an entity such as CFA is "organized to carry on business ... for profit" and is subject to its jurisdiction.

The Commission's test is derived from Section 501(c) (3) of the Internal Revenue Code which provides an exemption from income taxation for:

> [c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision or athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual ... .

Looking to this provision the Commission stated:

> The guidance from federal tax law is clear. Congress has sought to protect and support specific categories of not-for-profit organizations by freeing them from tax liabilities but only so long as (1) no part of their net earnings inures to the benefit of any private shareholder or individual and (2) the activities which generate the income--whether conducted by a feeder organization or by the exempt entity itself--are in furtherance of exempt purposes. The test is two-pronged and requires an adequate nexus between the entity's operations and recognized public purposes. CFA, at 23, 357.

[2] An expense which otherwise would necessarily be incurred by members, Ohio Christian College, 80 F.T.C. at 815, 848 (1972).

CDA argues that its operations satisfy this test because it is a bona fide nonprofit corporation which is exempt from federal taxation under a similar provision of the Internal Revenue Code, § 501(c)(6). (RB, pp. 4, 16-17).

CDA made the same argument in a motion for summary decision which I denied on September 27, 1994. In that order, I found that CFA did not undermine the relevance of the AMA decision, for the Commission held:

> We recognize that a respondent's status as either a § 501(c) (3) or (6) tax-exempt organization does not obviate the relevance of further inquiry into a respondent's operations and goals .... Rulings of the Internal Revenue Service are not binding upon the Commission.

Citing this language and referring to a significant difference between CFA and AMA, i.e., the for-profit nature of AMA's members' businesses, AMA, 94 F.T.C. at 989, I held that:

> even though CDA is exempt from federal taxation because it is a "bona fide" nonprofit organization, an additional issue must be addressed: whether its activities which confer a pecuniary benefit to its members are a substantial or incidental part of its total activities.

CDA has not convinced me that my ruling was incorrect; thus, inquiry into the Commission's jurisdiction over CDA must include an analysis of the pecuniary benefits which its activities confer on its members and a determination as to whether those activities represent "a substantial part of [CDA's] overall operation." AMA, 94 F.T.C. at 988 n.13.

In AMA, 94 F.T.C. at 986-91, 741-63, 785-93, 796-801, 918, 921-34, and MSMS, 101 F.T.C. at 283-84, the Commission and the ALJ found that the following activities of the respondents provided economic benefits to their members: lobbying; litigation; public relations and marketing; advice helping members to increase the efficiency, productivity, and profitability of their medical practices; professional placement; peer review; retirement; continuing education; publications; and non-profit subsidiaries and affiliates providing financial, insurance and other services.

Citing Community Blood Bank of Kansas City Area, Inc. v. FTC, 405 F.2d 1011, 1017, (8th Cir. 1969), CDA claims that it is not organized for its or its members' profit and that its profit-making activities are ancillary to its primary purpose, which is to serve public, not private, interests.

CDA serves the public interest through its councils which give advice about dental health and which monitor the ethics of its members (F. 14, 17, 18, 19, 22, 23); CDA has also taken positions on fluoridation and other matters which benefit the general public, but may adversely affect its members (F. 123-25, see also F.126-27).

Nevertheless, and despite the testimony of CDA's President, Dr. Craven (F. 128), the evidence presented by complaint counsel convincingly establishes that, as in AMA,

a substantial part of CDA's activities result in pecuniary benefits to its members:[3]

> Lobbying: CDA represents its members with respect to legislative, political and regulatory matters which, but for its intervention, might result in adverse pecuniary consequences (F. 70-73, 76-85). CDA has brought to its members' attention the pecuniary benefits of these activities (F. 74, 77).
>
> Litigation: By challenging, or supporting challenges to, legislation and regulatory activities which are adverse to their interests, CDA has benefited its members' pecuniary interests (F. 84).
>
> Marketing and Public Relations: CDA's marketing and public relations activities benefit its members by fostering a positive image of them (F. 86-88).
>
> Direct Reimbursement: Promoting direct reimbursement benefits CDA's members by avoiding problems engendered by insurer restrictions on payment and procedures (F. 89-91).
>
> Practice Management: CDA has an extensive array of programs which increases its members' efficiency and productivity (F. 92-97).
>
> Peer Review: CDA's peer review system may provide a less costly alternative to traditional methods of resolving patient complaints about dental problems (F. 98-100). See AMA, 94 F.T.C. at 798, 932, 988.

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[3] "Our determination that AMA engages in substantial activities for the economic benefit of its membership is intended in no way to denigrate the many valuable eleemosynary activities in which AMA is engaged [but] such activities do not ... provide immunity from the laws designated to protect the public from anticompetitive practices." AMA, 94 F.T.C. at 987.

Scientific Sessions: CDA's twice-yearly scientific sessions give its members the opportunity, cost free, to satisfy their continuing education requirements (F. 101-06). See AMA, 94 F.T.C. at 790, 986; MSMS, 101 F.T.C. at 211, 249.

Publications: As in AMA, 94 F.T.C. at 761, 791, 928, 932, 987 and MSMS, 101 F.T.C. at 208-09, 248, 283, CDA's publications provide pecuniary benefits to its members by proving technical and scientific information about dentistry (F. 107-08).

For-Profit Subsidiaries: CDA, through its for-profit subsidiaries, offers its members professional liability insurance (TDIC, F. 109-12), business and personal insurance (TDCIS, F. 113-15), and financial services (TDC, F. 116-18). See AMA, 94 F.T.C. at 757, 761-62, 790-91, 928, 932-33, 987-88; MSMS, 101 F.T.C. at 207-08, 210-11, 248-49, 283.

Membership in ADA and Local Components: Membership in ADA and a local component supplements and extends the benefits obtained from membership in CDA (F. 119-22). See AMA, 94 F.T.C. at 785, 796, 930-31, 988-89; MSMS, 101 F.T.C. at 212, 249.

The enumeration of these benefits establishes that a CDA member taking advantage of all, or even a few of them, would realize a substantial pecuniary benefit.

Statements made by CDA in touting the benefits of these services to its members -- and taking into account some exaggeration -- substantiate that conclusion (F. 67, 68, 74, 76, 77, 84, 88, 97, 99, 105, 108, 109). In contrast, CDA's services to the public accounted for seven percent of its total expenditures. The remainder went to direct member services, association administration and indirect member services (F. 69).

C. CDA, Its Members, and Its Component Societies Have Conspired to Restrain Members' Advertising

When an organization is controlled by a group of competitors, antitrust law views the organization as the competitors' agent, and the organization as a combination or conspiracy of its competitor-members. See Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988); National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 682, 692 (1978).

CDA is an association of competing dentists, who, by agreeing to abide by its Code of Ethics, including those provisions regarding advertising (F. 129-33), have conspired among themselves, and with CDA and the component societies which enforce those restrictions (F. 149-67). Compare AMA, in which the Commission stated that "promulgation of a code of ethics implies agreement among the members of an organization to adhere to the norms of conduct set forth in the code" 94 F.T.C. at 998 n.33. As to the component societies, the Commission held, in AMA, that AMA had conspired with its constituent and component medical societies since all of them had articulated, implemented, and enforced ethical guidelines, 94 F.T.C. at 996-1002.

Here, the evidence establishes, as complaint counsel contend, "a 'common design and understanding' on the part of respondent, its component societies, and the individual dentists that comprise the membership of those dental societies to promulgate, disseminate, and enforce ethical restrictions on advertising" (CB, p. 33). See American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946):

> Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding . . . the conclusion that a conspiracy is established is justified.

Copperweld Corp. v. Independent Tube Corp., 467 U.S. 752, 767 (1984) ("Copperweld"), relied upon by CDA, does not affect this conclusion. In this case, the Supreme Court held that under certain circumstances, legally separate entities such as a parent and its wholly owned subsidiary, "must be viewed as that of a single entity for purposes of [antitrust analysis]." If so treated, "there is no sudden joining of economic resources that had previously served different interests, and there is no justification for [antitrust] scrutiny." Id. at 771.

The Supreme Court in Copperweld was referring to a corporation and its wholly-owned subsidiaries which, because the law views them as an entity, are incapable of conspiring.

CDA, its component societies and its members are, in contrast, legally separate and independent entities which are engaged in activities whose purpose is to restrict truthful advertising, and they have therefore conspired to do so. See Massachusetts Board of Registration in Optometry, 110 F.T.C. 549, 610 (1988) ("Mass Board"). See also Northern Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 215 (D.C. Cir. 1986), cert. denied, 107 S. Ct. 880 (1987).

D. The Agreement to Restrict Advertising Violates Section 5 of the FTC Act

1. The Restrictions are Inherently Suspect

In Mass Board, the Commission found that the Board of Registration in Optometry had promulgated regulations restricting advertising by optometrists.

Citing recent Supreme Court decisions rejecting a per se analysis of conduct that is essential to a legitimate purpose,[4]

[4] NCAA v. Board of Regents of the Unv. of Oklahoma, 468 U.S. 85, 1012 (1984) ("NCAA"); Broadcast Music, Inc. v. CBS, 441 U.S. 1, 10, 23-24 (1979).

and recognizing that the Supreme Court has been reluctant to condemn rules adopted by professional associations as presumptively unreasonable, Mass Board, 110 F.T.C. at 602, 606, the Commission adopted a method of analysis which "is more useful than the traditional use of the per se or rule of reason labels but which is consistent with the recent cases that apply a traditional analysis." Mass Board, 110 F.T.C. at 603-04.

> This structure is readily described as a series of questions to be answered in turn. First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and reduce output"? . . . If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a second question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition . . . Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry -- a third inquiry -- is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry -- there are no likely benefits to offset the threat to competition.

Mass Board, 110 F.T.C. at 604 (emphasis in original).

Since "[a]dvertising plays an indispensable role in the allocation of resources in a free enterprise system" Bates v. State Board of Arizona, 433 U.S. 350, 364 (1977), restraints on truthful advertising "are inherently likely to produce

anticompetitive effects," Mass Board, 110 F.T.C. at 605, AMA, 94 F.T.C. at 1005, and are illegal absent a plausible justification.

CDA has a legitimate interest in fostering truthful, informative advertising by its members and has, since 1985, announced an advertising policy which would restrict only those advertisements which are false or misleading in a material respect (F. 246) or which are false or misleading in their entirety (F. 247).

However, CDA has not followed its policy, and has, instead, created confusion among its members as to the meaning of "material respect" (F. 217-221) and what is or is not acceptable in their advertising (F. 250-58).

This confusion is caused by uncertainty about the role of CDA's Judicial Council and the component societies. The result is the lack of a consistent procedure to inform members about changes in CDA's advertising rules (F. 259-64). Thus, CDA has banned not only those advertisements which violate its announced policy but also advertising which is lawful and informative.

CDA's actions are consistent with a mindset which believes that advertising by dentists is demeaning (F. 135-40), a view which the Supreme Court has long condemned. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976):

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.

See also AMA, 94 F.T.C. at 1026:

> The equivocal language of [AMA's] 1976 Statement and its often antagonistic tone toward advertising and solicitation . . . has sent a clear signal to the profession.

As a consequence, CDA has successfully (F. 275-93) withheld from the public information about prices (F. 168-73), discounts (F. 174-82), quality (F. 183-93), superiority of service (F. 194-204), guarantees (F. 205-07), and the use of procedures to allay patient anxiety (F. 208-16).

CDA has also, regardless of their truth, expressed displeasure with claims that are allegedly insulting, offensive to peers, vague or ambiguous, subjective, or do not elevate the esteem of the profession. CDA has also banned advertising listing more than one location or which claims a religious or ethnic affiliation (F. 222). All of these restrictions are inherently suspect. Mass Board, 110 F.T.C. at 606 (restrictions on price advertising are "aimed at affecting the market price"); Mass Board, 110 F.T.C. at 607: "The fact that [a] ban deprives consumers of information concerning service rather than price in no way diminishes the inherently anticompetitive nature of the restraints."

2. The Restrictions Are Not Justified

CDA has not met its burden of establishing that the inherently suspect advertising restrictions which it has imposed "are capable of creating or enhancing competition," Mass Board, 110 F.T.C. at 604.

The reason that CDA adopted its advertising policy may have been, in part, to protect consumers from false or deceptive advertising, but its policy also reflects, in its inception and its implementation, a hostility toward advertising by its members even if it is truthful and nondeceptive.

As a voluntary regulator of its members' advertising, CDA should have enforced its policy so that its restraints were "narrowly directed toward false or deceptive advertising," AMA, 94 F.T.C. at 1009. It has not done so. Instead, it has failed to apply "general principles of deceptive advertising law in a . . . context taking into account the substantial body

of law construing Section 5 of the FTC Act," AMA, 94 F.T.C. at 1030, and has unjustifiably banned whole categories of advertisements which are not false or misleading in a material respect.

Thus, CDA has banned price advertisements which are inexact (F. 168) or which fail to reveal all price information even though the Supreme Court in Bates v. State Bar of Arizona, 433 U.S. 350, 381 (1977), recognized that there was no reason for a ban on the phrase "very reasonable fees," because "advertising will permit the comparison of rates among competitors, thus revealing if the rates are reasonable." Id. at 382 (F. 169). See also AMA, 94 F.T.C. at 1030: "it is especially important that price advertising remain as unfettered as possible." CDA has done the opposite: it has adopted rules for discount advertising which effectively outlaw it by imposing requirements which cannot be met (F. 179-80).

CDA's fears of the deceptive potential of non-price claims has also resulted in unnecessary disputes about and bans on advertising claims of quality or superiority of service on the grounds that they are subjective, unverifiable and incapable of measurement (F. 226-29). See AMA, 94 F.T.C. at 1023:

> Respondent's counsel defended the ban on self-laudatory and superiority claims on the grounds that such claims convey no useful information and can only be misleading, since they are not susceptible to any kind of measurement. This characterization of claims on the basis of their utility to consumers or ease of measurement illustrates the potential scope of respondent's ban on "solicitation."

CDA argues that its members have leeway with respect to advertising claims, but the evidence belies its assertion. For example, CDA's requirements for discount claims effectively ban advertising making this claim without regard to their truth and the same is true with respect to other claims: price

(F. 170); quality (F. 183, 186); superiority (F. 198); guarantees (F. 205); and, miscellaneous claims (F. 222).

CDA cannot justify its advertising restrictions by pointing to state law (F. 230) as a model for determining what is or is not lawful:

> A state, acting on behalf of the interest of its citizens, is undoubtedly entitled to greater latitude in preventing deceptions and unfair practices than a professional association representing the interests of horizontal competitors, AMA, 94 F.T.C. at 1010 n.55.

In any event, CDA has expressed displeasure about members' advertisements which would satisfy state law (F. 234-43).

Finally, CDA's fears that dentists involved in school screenings (F. 295-98), may pressure children or parents into using their services is not supported by any record evidence and its actions have denied schoolchildren the benefits of dental screening.

3. CDA's Members Do Not Have Market Power

Relying on testimony by Dr. Knox, CDA's economic expert, complaint counsel state that "respondent's members collectively have, and can exercise, market power in the dental service market in California" (CB, p. 52).

CDA, its components and its members have illegally conspired to prevent members, and potential members, from using truthful, nondeceptive advertising, and this conspiracy has injured those consumers who rely on advertising to choose dentists.

This conclusion, which is well-documented, does not, however, establish that CDA's members have "market power" -- i.e., the "ability to raise prices above those that

would prevail in a competitive market," United States v. Brown University, 5 F.3d 658, 668 (3d. Cir. 1993).

Complaint counsel's argument is based on Dr. Knox's agreement on cross-examination that California could be a relevant geographic market, and that dental services could be a relevant product market (F. 328). However, Dr. Knox did not testify that these markets existed.

Complaint counsel also obtained a concession, based on a hypothetical, that CDA members could collectively exercise market power if they acted together (F. 328) but Dr. Knox did not testify that CDA, in fact, could exercise market power and complaint counsel have not produced any convincing evidence that CDA members have acted or could act together to raise prices or reduce output, nor have they established in what geographic market or markets the alleged market power could be exercised.

The problems experienced by dentists in opening a practice in California are real (F. 329-31) but they do not pose an insurmountable obstacle to entry. Since that is the case, CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local. See Langefeld and Morris, Analyzing Agreements Among Corporations: What Does The Future Hold? 36 Antitrust Bull. 651, 677 (1991):

> [e]ntry by independent firms prevents voluntary associations from raising prices above the competitive level that would exist without the association.[5]

However, the failure to establish the conditions for satisfaction of a Rule of Reason analysis[6] is not fatal. See Mass Board, 110 F.T.C. at 602 n.8:

[5] Messrs. Langefeld and Morris were, respectively, the Director and Assistant to the Director for Antitrust in the FTC's Bureau of Economics.

> The Court [in FTC v. Indiana Dentists, 476 U.S. 447 (1986)] rejected the dentists' argument that the Commission erred in not making elaborate market power determinations. . . .

IV. SUMMARY

A. The Commission has jurisdiction over the acts and practices of CDA which are challenged in the Complaint.

B. CDA, along with its components and members, has engaged in a combination or conspiracy to restrain trade by unreasonably preventing its members or potential members from using truthful, nondeceptive advertising to the injury of its members and to consumers of dental services.

C. CDA's acts and practices unreasonably restrain competition and constitute an unfair method of competition in violation of Section 5 of the FTC Act.

V. ORDER

In view of CDA's violation of Section 5 of the FTC Act, the order proposed by complaint counsel is, with one exception, justified.

Part I defines terms used in the order. The only unusual definition is that of "restricting," which is defined as "taking any action against a dentist based on the advertising practices of the dentist's employer." There is evidence that this has occurred and the prohibition is appropriate (F. 210, 293).

[6] "Substantial market power is an essential ingredient of every antitrust case under the Rule of Reason," Sanjuan v. The American Board of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994).

Part II of the order requires CDA to cease and desist from engaging in practices which the complaint challenges, including its restraints on advertisement of price, services, facilities, and equipment.

Part III A of the order requires CDA to remove from its Code of Ethics provisions that are inconsistent with the order. Part III A also requires CDA to remove from its Code of Ethics and Bylaws any other policy statements or guidelines that are inconsistent with Part II of the order.

Part III B of the order requires respondent to ban any component that continues to engage in practices prohibited by Part II of the order.

Part IV A of the order requires CDA to inform its members of the order's provisions.

Part IV D of the order requires CDA, for five years, to mail a copy of the order, complaint and announcement to each new member.

Parts IV B and IV C of the order require CDA to send notices to and reconsider the membership status of certain members who have been disciplined by CDA in the enumerated ways.

Parts V A and V B of the order require CDA, every six months for three years, to maintain a written record for each time it or its component societies take action against a dentist because of his or her advertising practices.

Part VI A of the order requires CDA to establish and maintain, for five years, a program which will ensure its compliance with the order.

Parts VI B-E are standard provisions common to other Commission orders.

CDA objects to certain provisions of the order. It claims that since it has never restricted advertising because it is undignified or unprofessional, Part II of the order which requires it, inter alia, not to restrain "representations not contributing to the esteem of the public or the profession" should be stricken. This part of the order is appropriate because CDA and its components have expressed concerns about such advertising (F. 222).

CDA also opposes the requirement in Part IV C that would require it to send notice to, and reconsider the membership applications of, members who were dropped by CDA over the last ten years for non-payment of dues. I agree that this provision has no apparent connection with CDA's illegal acts and it will be stricken.

Finally, CDA argues that Part III of the order is vague. This part requires CDA to remove from its Code and Bylaws any provision which is inconsistent with provisions of Part II. There may be differences of opinion by CDA and Commission staff about provisions which are inconsistent but they can be resolved without resorting to further litigation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA DENTAL ASSOCIATION,	)	
	)	
Petitioner,	)	No. 96-70409
	)	
v.	)	FTC Docket No. 9259
	)	
FEDERAL TRADE COMMISSION,	)	ORDER
	)	
Respondent.	)	
	)	

Before: CHOY and HALL, Circuit Judges, and REAL, District Judge.*

Judges Choy and Hall have voted to deny petitioner's petition for rehearing. Judge Real would grant the petition. Judges Choy and Hall have recommended rejection of the suggestion for rehearing en banc and Judge Real would accept the suggestion.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

* Hon. Manuel L. Real, United States District Judge for the Central District of California, sitting by designation.